SUPREME COURT, U. S.

AUG 9 1969

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1969

No. 451

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOODS EXPRESS, INC., and YELLOW FREIGHT SYSTEM, INC. (Successor to Watson-Wilson Transportation Co., Inc.),

Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

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Appellees.

On Appeal From the United States District Court for the Central District of California.

JURISDICTIONAL STATEMENT.

Opinions Below.

The Order of the District Court for the Central District of California was issued on May 12, 1969, and, as yet, has not been reported. Said Order affirms the Decision of the Interstate Commerce Commission, dated July 29, 1968, and adopts as its own the Commission's Findings of Fact. The Commission Decision by Dando (short form decisional technique) adopts and affirms the Decision and Order of Review Board Number 3 of the Interstate Commerce Commission, dated April 18,

1968; finally, by the same Dando technique, said Review Board Number 3 of the Interstate Commerce Commission adopted and affirmed as amended, the Report and Order recommended by the Hearing Examiner dated December 14, 1964. Copies of the Court's Order dated May 12, 1969; Report and Order recommended by Hearing Examiner, dated December 14, 1967; Decision and Order of Review Board Number 3, Interstate Commerce Commission, dated April 18, 1968; and Decision of the Interstate Commerce Commission, Division 1, acting as an Appellant Division, dated July 29, 1968, are annexed hereto as Appendices A, B, C, and D, respectively, *infra*.

Grounds on Which Jurisdiction Is Invoked.

1. *The nature of the proceeding.* Appellant appeals from the judgment of a three-judge District Court of the United States (convened pursuant to 28 U.S.C. 2281) dismissing plaintiff's action to set aside a Decision and Order of the Interstate Commerce Commission Review Board No. 3, decided on April 18, 1968, denying appellant's Application for a Contract Carrier Permit.

2. *Date of Judgment or Order sought to be reviewed.* The Order sought to be reviewed was dated and entered May 12, 1969. No separate Order, Judgment or Decree was entered. There was no petition, application or request for rehearing. A Notice of Appeal to this Court was filed in the United States District Court, Central District of California, on June 10, 1969.

3. *Statutory provision re jurisdiction.* The statutory provision believed to confer jurisdiction of this appeal on this Court is 28 U.S.C. 1253.

4. *Cases sustaining jurisdiction.* Cases believed to sustain that jurisdiction are: *St. Louis and O'Fallon Ry. Co. v. U.S.*, Mo. (1929), 279 U.S. 461, 73 L. Ed. 798; *Rorick v. Board of Com'rs. of Everglades Drainage District*, Fla. (1939), 307 U.S. 208, 83 L. Ed. 1242; *Radio Corp. of America v. U.S.D.C.*, Ill. (1950), 341 U.S. 412, 95 L. Ed. 1062; *Zemel v. Rusk*, Conn. (1965), 381 U.S. 1, 14 L. Ed. 2d 179, Rehearing Denied, 382 U.S. 873, 15 L. Ed. 2d 114.

Statutes Involved.

Interstate and foreign commerce motor carriers are governed by Part II of the Interstate Commerce Act (Act) (49 U.S.C. 301-327). This Act is to be administered and enforced with a view to carrying out the National Transportation Policy as set out preceding Parts I, II, III and IV of the Act (49 U.S.C. preceding Sections 1, 301, 901, and 1001) and set forth in full in Appendix E.

The particular statutory provisions in question are:

49 U.S.C. 303(a)(15) which provides:

> "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in Paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer."

49 U.S.C. 309(a) which requires a Permit issued by the Commission prior to engaging in contract carriage by motor vehicle in interstate or foreign commerce.

49 U.S.C. 309(b), which reads, in pertinent part, as follows:

> ". . . Subject to Section 310, a permit shall be issued to any qualified applicant therefor authorizing in whole or in part the operations covered by the application, if it appears from the application or from any hearing held thereon, that the applicants is fit, willing and able properly to perform the service of a contract carrier by motor vehicle and to conform to the provisions of this part and the lawful requirements, rules and regulations of the Commission thereunder, and the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act; In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit will have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and or its shipper and the changing character of that shipper's requirements . . ."

Additional sections of the Interstate Commerce Act involved are set forth in Appendix E.

The following portions of the Constitution of the United States are also involved:

ARTICLE I

Section 8. The Congress shall have Power . . . (Cl.3) to regulate commerce with foreign nations, and among the several states and with the Indian Tribes;

AMENDMENT V

No person shall be held to answer for a capital or other infamous crime unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service, in time of war or public danger; . . . nor be deprived of life, liberty, or property, without due process of law;

Questions Presented.

A. Whether a contract carrier applicant, dedicating its equipment to the continuing exclusive use of a single supporting shipper, is entitled to demonstrate a lesser quanum of proof upon applying the 49 U.S.C. 309(b) criteria than another applicant furnishing transportation services designed to meet the distinct need of each customer?

B. Whether the three-judge District Court below, in affirming the Commission Decision, misapplied 49 U.S.C. 303(a) (15) and 309(b) compelling appellant to meet all five criteria of 49 U.S.C. 309(b) as to *each* of the *two* shippers originally appearing in support of the Application, when in fact, at the time of the Commission's final Decision, there was but a single supporting shipper?

C. Whether the Commission misapplied the criteria "the number of shippers to be served" in the light of the Commission's established case precedent?

D. Whether the Commission erred in compelling appellant, an exclusive use applicant under 49 U.S.C. 303(a)(15)(a), to meet the criteria solely required of a distinct need service applicant under 49 U.S.C. 303-(a)(15)(b)?

E. Whether the Commission in compelling appellant to establish inadequacy of existing services, not within the purview of 49 U.S.C. 309(b), was an arbitrary, discriminatory, and unlawful additional burden placed upon appellant, and denies appellant due process of law?

F. Whether the Commission erred, acted arbitrarily, capriciously, unlawfully, and contrary to the evidence in adopting the Review Board Number 3's implied finding that a denial of authority "would have no apparent adverse effect (sic) on them ('shippers') in that said Board implied a non-existent finding and the Commission's final Decision was based upon evidence relating to more than one shipper?

G. Whether the Commission erred, acted arbitrarily, capriciously, and contrary to law in manifesting a special solicitude for some of the 49 U.S.C. 309(b) tests to the exclusion of the test evidencing "the changing character of the shipper's requirements"?

H. Whether 49 U.S.C. Sections 303(a)(15) and 309(b), when construed and applied by the Commission and adopted by the three-judge Court below, denied appellant substantive due process in violation of the Fifth Amendment of the Constitution of the United States in that appellant was denied the grant of authority sought.

Statement of the Case.

Background.

By its original permanent authority application filed December 19, 1966, appellant, a California corporation, seeks a Permit authorizing operations as a contract carrier, serving three supporting shippers, from named points in seven specific Midwestern States to points and places in California, over irregular routes, transporting meat, meat products and meat by-products and articles distributed by packing houses. On March 14, 1967, appellant was granted temporary authority to perform the operations sought by it in its Permanent Authority Application, *supra.*

At hearings on the permanent authority application one shipper was eliminated and on December 14, 1967, the Interstate Commerce Commission Hearing Examiner recommended denial of the aforesaid Application (Appendix B hereof). On April 18, 1968, Review Board Number 3 by Dando (a short form decisional technique) affirmed the Hearing Examiner's Report and Order, adding a finding to the effect that there would be no adverse effect upon the supporting shippers. The second of the three supporting shippers was thereafter eliminated by Petition for Reconsideration filed by appellant (*T. R. pp. 92-3) and, on July 29, 1968, Division 1 of the Interstate Commerce Commission, acting as an Appellate Division by said Dando method, affirmed the April 19, 1968 Review Board Number 3's affirmation of the Examiner's Report and Order.

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*Indicates the pages at which the particular referenced fact appears in the Transmitted Record upon appeal from the United States District Court, Central District of California to the United States Supreme Court.

Summary of Complaint.

On December 3, 1968, appellant filed a complaint in the District Court below seeking to suspend, enjoin, annul and set aside the decisions and orders of the Interstate Commerce Commission (Appendices C and D). A temporary restraining order was issued on said date.

By said complaint, appellant contends the decisions and orders are:

(a) Contrary to law, in violation of constitutional right and without observance of substantive due process as required by law;

(b) Arbitrary, capricious, without rational basis, and abuse of Commission discretion; and

(c) Unsupported by any substantial evidence.

In support of the foregoing, appellant contends:

1. Although 49 U.S.C. 309(b) criteria are applicable to contract carrier applications, the quantum of proof under the five criteria varies depending upon the type of contract carriage as defined in 49 U.S.C. 303(a)(15)(a) or 303(a)(15)(b);

2. The Commission required all five 49 U.S.C. 303 (b) criteria be met for *each* shipper prior to grant of authority.

3. The decisions failed to consider the first criteria of 49 U.S.C. 309(b) save as to the characterization of the applicant in the light of 49 U.S.C. 303(a)(15);

4. The dual requirement of establishing uniqueness of service and proof of inadequacy of existing services was an impermissible burden placed upon appellant;

5. The Commission presumption that a grant of authority *could* have an adverse effect upon existing services is erroneous in law and in fact;

6. The decisions, in effect, ignore the effect on the shipper and/or the applicant (appellant); and

7. The decisions failed to recognize the continuing changes in the shipper's business operations.

In the light of the foregoing, appellant asserts that the Commission incorrectly concluded that the grant of authority sought would not be consistent with the public interest and the national transportation policy as declared in the Act (Appendix E).

The appellees assert that the Commission in fact did correctly conclude that the grant of authority would not be consistent with the public interest and the national transportation policy alleging: (1) the Commission correctly applied the statute; and (2) the Commission correctly applied the five criteria of 49 U.S.C. 309(b).

Proceedings in the District Court.

The matter in the District Court below was exhaustively briefed (Appellant's Brief—T. R. p. 233, *et seq.*; Appellees' Briefs, T. R. p. 326, *et seq.* and 364, *et seq.*; Reply Brief of Appellant, T. R. 396, *et seq.*). On April 28, 1969, the matter was orally argued before the three-judge District Court, and thereafter, on May 12, 1969, the District Court issued its Order (Appendix A) affirming the Commission's decision and ordered dismissal of Appellant's Complaint to set aside said Commission decision denying applicant's Application for a Contract Carrier Permit.

Summary of Findings of Fact and Conclusions of Law by the District Court.

By adoption of the Findings of Fact of the Commission, the Court below found:

1. Regarding the nature of the service proposed, that applicant (plaintiff below) failed to establish that there was anything distinct or specialized about the service that differs essentially from that offered by existing common carrier protestants (intervening defendants below), or that applicant is better able to meet the shippers' transportation requirements than are protestants;

2. The shippers have failed to establish that protestants are unable or unwilling to provide such services;

3. Neither shipper has shown any particular familiarity with the services afforded by existing carriers;

4. The record fails to show that these shippers have any distinct needs which can better be met by applicant than by the protestants;

5. A grant of the application could adversely affect the operations of existing carriers;

6. A denial of the application would have no apparent adverse effect upon applicant;

7. There is no evidence regarding any significant change in the character of either shipper's requirements that protestants would be unable or unwilling to meet.

The Court below further found, as to the plurality of shippers, that the Application was considered by the Interstate Commerce Commission Review Board No. 3

as "a request to serve only one shipper" and, further, that applicant was a contract carrier by virtue of motor vehicles exclusively assigned to the shipper pursuant to 49 U.S.C. 303(a) (15)(a). (Appendix A, p. 4).

Finally, the Court concluded that the decision of the Commission determining that the grant of authority sought would not be consistent with the public interest and the National Transportation Policy was based upon adequate findings within the special expertise of the Board and the Commission and the same were based upon substantial evidence and in accordance with applicable law, citing no cases in support of the Order. (Appendix A, p. 2).

Substantiality of Federal Questions.

This appeal, involving the actions of the Interstate Commerce Commission, presents issues of crucial importance, particularly to small truckers and shippers, whose ability to compete with established large common carriers and integrated carrier-shippers may be impaired by the Commission's unlawful, uncertain and selective application of the Interstate Commerce Act and particularly Sections 203(a)(15) and 209(b) thereof (49 U.S.C. 303(a)(15) and 309(b)), without effective judicial supervision and control.

The questions raised in this case are extremely vital due process questions affecting property rights of the small carrier or "would be" carrier. For, if the improper construction, discriminatory and non-uniform application of the law, exemplified by the Interstate Commerce Commission in the instant proceeding, and affirmed by the three-judge District Court below, is not ruled unlawful and violative of the due process

rights of the said contract carrier applicant, it means that in any exclusive and continuing use of equipment application proceeding applicant must veritably establish not only that the service is unique, distinctive and of a type and character separate and apart from that of the protestant highway common carrier, but also that said carriers are unwilling or unable to perform the proposed service.

Plenary consideration is necessary for these reasons:

1. This appeal presents to this Court for the first time the full and complete determination of the construction and application of 49 U.S.C. 309(b) in contract carrier applications filed pursuant to the alternative definitions contained in 49 U.S.C. 303(a)(15)(a) or (b). Reference to said section notes the disjunctive use of the words in (a) "continuing period of time to the exclusive use" and in (b) "services designed to meet the distinct need of each individual customer".

The term, "distinct need" in Section 303(a)(15) is not the same as the criteria set forth in Section 309(b), nor may the "distinct need" in 303(a)(15) be properly used interchangeably with the determination to be made under 309(b) pursuant to the prescribed criteria therein contained. *Mid-West Truck Lines, Ltd. v. U.S., et al.* (1967), 269 F. Supp. 554; *Meat Packers Express, Inc. v. U.S., et al.* (1965), 244 F. Supp. 642. The case of *Interstate Commerce Commission v. J-T Transport Co., Inc.*, 368 U.S. 81, 14 Fed. Carr. Cases 81,409, sets forth, with considerable degree of thoroughness, the construction and application of the Section 309(b) criteria to contract carrier applications filed under Section 303(a)-(15)(*b*), including the aspects of need for service vs.

adequacy of existing services; burden of proof; distinct need for service; and shipper's requirements, but fails to distinguish the extent, degree or intensity in the application of the said Section 309(b) five criteria to a request for contract carrier permit filed pursuant to Section 303(a)(15)(*a*). The Commission's and the Board's adoption of the examiner's Report and Order (Appendix B) and the District Court's adoption of the Commission decision in the instant case evinces the fact that the hearing examiner required a showing of distinct need (*i.e.*, meaning unique, singular different from the ordinary and not met by protestants), not for the purpose of meeting the requirements of the alternative 303(a)(15) definitions, but with reference to the requirements of Section 309(b), the second factor thereof, namely "the nature of the service proposed".

The Commission, and by adoption, the District Court below, erred in requiring that *each* of the five criteria of Section 309(b) be met for each shipper prior to grant of authority. Said Section permits issuance of a permit to any qualified applicant authorizing "in whole or in part" the operations covered by the application if the applicant is fit, willing and able and the proposed operation is consistent with the public interest and the National Transportation Policy declared in the Act. The District Court below found that the Board Decision and Order (Appendix C) considered the application under a request by appellant to serve "only one shipper" (Appendix A, p. 1). Reference to said Decision and Order reflects consideration as to *"more than one shipper"* in its first finding paragraph (Appendix C. p. 35).

The most significant criteria appertaining to a continuing period exclusive use applicant (appellant here) is the first factor or test of Section 309(b), "the number of shippers to be served". The District Court below, the Commission, and the Board disregarded said factor. Interstate Commerce Commission case precedent has established that the first criterion "means that the applicant's case is stronger or weaker in proportion to the number of its contracting shippers". *In William P. Bursch Extension-Lumber* (1963), 91 M.C.C. 953, 15 Fed. Carr. Cases 35,569. Where there is but one shipper the Commission has opined "It would be impossible to make any stronger showing under the test involved". *Meat Packers Express, Inc.—Extension—Dennison*, 100 M.C.C. 401 (on remand) 1966 Fed. Carr. Cases 35,978.

2. This appeal presents the question whether 49 U.S.C. 309(b) as construed and applied, is repugnant to the due process clause of the Fifth Amendment to the U.S. Constitution. Further, although there is no "equal protection clause" applicable to the Federal Government (*LaBelle Iron Works v. United States* (1921), 256 U.S. 377, 41 S. Ct. 528, 65 L. Ed. 998), the Federal Constitution does require *uniformity* in certain instances, *e.g.*, in the imposition of indirect taxes (Art. I, Section 8); and it has been declared that *discrimination* may be so arbitrary and injurious as to be deemed a violation of due process. See *Detroit Bank v. United States* (1943), 317 U.S. 329, 63 S. Ct. 297, 87 L. Ed. 304; *Bolling v. Sharpe* (1954), 347 U.S. 497, 74 S. Ct. 693, 694; *Schneider v. Rusk* (1964), 377 U.S. 163, 84 S. Ct. 1187, 1190, 12 L. Ed. 2d 218. Appellant submits that the construction and application of the statutes

as set forth in the Questions Presented, *supra*, and as herein supported, were so construed and applied without any regard for the practicalities or peculiarities of either the individual application case or the kind of application cases which arise before the Interstate Commerce Commission.

The question affects the proper processing of all contract carrier applications before the Interstate Commerce Commission and the determination of the proper tests applicable to the alternative type contract carrier applicants is vital to the preservation of the right of substantive due process as required by the Constitution.

The Commission and the District Court below, by adoption of the Commission decision, in compelling appellant to establish inadequacy of existing services, as well as proof of service of a type not performed by common carriage was an arbitrary, discriminatory and unlawful additional burden placed upon applicant and denied applicant due process of law. To require appellant to prove it could assign vehicles *more satisfactorily* than protesting common carriers is imposing an "impossible burden of proof" upon appellant. *Moyer Contract Carrier Application*, 88 M.C.C. 767. Section 309 (b) and the Supreme Court's opinion in the *I-T Transport Company* case do *not* require applicant to prove *each* of the five criteria by a preponderance of the evidence. Rather, the evidence must be weighed against all five criteria as a group and if, in the weighing, the scales tip in favor of the applicant, the application must be granted. For contract carriers who propose to assign equipment for a continuing period of time to the exclusive use of a shipper, as distinguished from those who propose to render a distinctive or

specialized service, the burden of proof imposed by the Commission and the District Court below can be met only by showing the untried services of protesting carriers to be inadequate. In the *J-T* case the Supreme Court held that a presumption as to the adequacy of existing services was not justified and in addition the Court indicated that the adequacy of the services of protesting carriers, where such carriers do not enjoy the traffic (as here), would be a determinative factor under the provisions of Section 309(b) "only in the unusual case" (308 U.S. 81 at 93). The effect of the Commission decision is to make adequacy of existing service a conclusive ground for denying the applications of all carriers who propose to serve one shipper or a limited number of shippers by assigning vehicles to his (their) exclusive use for continuing periods of time.

3. The Commission and the District Court erred in adopting the following procedural burden of proof for resolving the contrary implications of two 309(b) tests: (1) "the nature of the service proposed"; and (2) "the effect which granting the permit would have upon the services of protesting carriers", as follows:

> "The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show that they have the ability as well as the willingness to meet that specialized need. If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants." (308 U.S. 81 at 90).

The procedure outlined above is inappropriate where the applicant does not necessarily propose a service which is specialized and tailored to a shipper's distinct need. In its literal application of the above-quoted language of the Court, the Commission and the District Court below imposes a burden of proof which, in effect, repeals the Subsection (a) of Section 303(a)(15)(a) except for applicants who prove that existing carriers are unable or unwilling to handle the traffic involved. The exception is contrary to the Supreme Court's opinion that the Commission "should not manifest special solicitude for that criterion which directs attention to the situation of protesting carriers" (*J-T* case, 368 U.S. at 89). Further, the fact, not considered by the District Court below nor the Commission, that the protesting carriers are not now transporting the traffic involved and will not get it whether the application is granted or denied, is a highly relevant factor.

4. The Commission and the District Court below, and adoption, erred in manifesting a "special solicitude for that criterion which directs attention to the situation of protesting carriers, at the expense of that which directs attention to the situation of supporting shippers, when those criteria have contrary implications." *Interstate Commerce Commission v. J-T Transport Co.*, 368 U.S. 81 at 89. The commission decision ignored the fourth criterion—"the effect which denying the permit would have upon the applicant or its shipper" (emphasis added) in that Review Board No. 3's implied finding that a denial of authority "will have no apparent adverse

effect up the shippers" (Appendix C, p. 35) obviously refers to *more than one* shipper and is based upon a non-existent finding in the hearing examiner's Report and Order (Appendix B). Add to that the finding by said examiner that shipper Hoffman (the ultimate sole supporting shipper) "will, however, engage fully in private carriage if such authority is not granted" evinces a complete disregard of application or consideration of the fourth criterion under Section 309(b).

5. Finally, the Commission and the District Court below, by adoption of the Commission decision, erred in failing to properly apply the fifth factor of Section 309 (b), "the changing character of that shipper's requirements" other than to find, without supporting evidence, "there is no evidence regarding any significant change in the character of either shipper's requirement that the *protestants would be unable or unwilling to meet*" (emphasis added) (Appendix B, p. 32).

Absent a single citation of authority to support the reasoning of the District Court below, the Commission's decision, the Review Board No. 3's decision and order and the Examiner's report and order, appellant submits that the Commission did not properly employ the statutes nor appropriately evaluate the requisite criteria, made findings not supported by substantial evidence; and the denial of the authority sought prevented substantive due process afforded appellant in violation of the Fifth Amendment of the Constitution. Whether the due process clause of the Fifth Amendment tolerates

such arbitrary capricious, unlawful and discriminatory agency action, unchecked by meaningful judicial review, is a substantial issue deserving review by this Court.

Conclusion.

Probate jurisdiction of this appeal should be noted.

Respectfully submitted,

SAMUEL B. PICONE,
HARRY ROSS,
DONALD MURCHISON,
Attorneys for Appellant.

EXHIBIT A.

Order.

United States District Court, Central District of California.

Transportation Unlimited of California, Inc., Plaintiff, vs. United States of America and Interstate Commerce Commission, Defendants. Civil No. 68-1987-S.

Filed May 12, 1969.

Plaintiff filed an action under 28 U.S.C. §§ 2284 and 2321-2325 to set aside a decision and order of the Interstate Commerce Commission Review Board No. 3, decided on April 18, 1968, denying plaintiff's application for a contract carrier permit. Plaintiff's original petition requested a permit to serve more than one shipper, but before the final decision, the application had been restricted to a request to serve only one shipper. It was considered by the Board in this posture.

It was determined that plaintiff proposed to operate as a contract carrier in view of the fact that motor vehicles were exclusively assigned to the shipper. This is a proper determination pursuant to the provisions of 49 U.S.C. § 303(a)(15)(a). The Board then turned to the provisions of 49 U.S.C. 309(b) to determine whether the issuance of the requested permit would be consistent with the public interest and the national transportation policy.

The considerations of public interest and national transportation policy are many and varied and within the special expertise of the Board and the Commission. While the findings and opinion of the examiner might have been more explicitly stated, or the Board

or the Commission in adopting it might have added some clarification, its meaning is abundantly clear when it is viewed as a whole and no error is apparent.

The decision of the Commission that granting the application would not be consistent with the public interest and national transportation policy was based upon adequate findings based upon substantial evidence and in accordance with applicable law. This decision and the refusal to grant a further hearing was a rational exercise of administrative discretion.

IT IS ORDERED that the Findings of Fact of the Commission are adopted by this Court and the decision of the Commission is affirmed and the complaint is dismissed.

DATED: May ..... 1969.

M. Oliver Koelsch
U. S. Circuit Judge

Albert Lee Stephens, Jr.
U. S. District Judge

E. Avery Crary
U. S. District Judge

EXHIBIT B.

INTERSTATE COMMERCE COMMISSION

Served December 14, 1967

Notice to the Parties.

Exceptions, if any, must be filed with the Secretary, INTERSTATE COMMERCE COMMISSION, Washington, D. C., and served on all other parties in interest, within 30 days from the date of service shown above, or within such further period as may be authorized for the filing of exceptions. At the expiration of the period for the filing of exceptions, the attached order will become the order of the Commission and will become effective unless exceptions are filed seasonably or the order is stayed or postponed by the Commission. To be seasonably filed, exceptions must reach the Commission on or before the date they are due. If exceptions are filed, replies thereto may be filed within 20 days after the final date for filing exceptions. If the recommended order becomes effective as the order of the Commission, a notice to that effect, signed by the Secretary, will be served.

No. MC-128732 (Sub-No. 1)

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., CONTRACT CARRIER APPLICATION

Decided .....

Application seeking a permit authorizing operations as a contract carrier, denied.

Harry Ross for applicant.

Ralph W. Pulley, Jr., Donald L. Stern, John M. Records, Edward G. Bazelon, and *Arnold L. Burke* for protestants.

REPORT AND ORDER RECOMMENDED BY JAMES A. McKIEL, HEARING EXAMINER

By application filed December 19, 1966, Transportation Unlimited of California, Inc., of Beverly Hills, Calif., seeks a permit authorizing operation, in interstate or foreign commerce, as a contract carrier by motor vehicle, over irregular routes, of meat, meat products, meat byproducts and articles distributed by meat packinghouses as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209 and 766, from points in Iowa and from York, Dakota City, Omaha, Fremont, and Scottsbluff, Nebr., Huron, Sioux Falls, Watertown, Madison and Mitchell, S. Dak., Wichita, Hutchinson, and Kansas City, Kans., Chicago and Momence, Ill., St. Paul, Minneapolis, Austin, Albert Lea, and Worthington, Minn., and Madison, Milwaukee, and Eau Claire, Wis., to points in California, under contract with Hoffman Brothers Packing Company, Inc., and Wilsey Bennett Company, hereinafter called Hoffman and Bennett, respectively.

The application was referred to the examiner for hearing and the recommendation of an appropriate order thereon. Hearing was held on June 5 and 6, 1967, at Los Angeles, Calif., and on July 11, 1967 at Washington, D. C. The application is opposed by Frozen Food Express, Watson-Wilson Transportation System, Inc., Little Audrey's Transportation Co., Inc., Midwest Emery Freight System, Inc., Midwest Coast Transport, Inc., Ringsby Truck Lines, Inc., W. J. Digby, Inc., W. J. Digby, Inc. of Iowa, Curtis, Inc., and Refrigerated

Foods, Inc. Vitalis Truck Line presented evidence in support of the protest of W. J. Digby of Iowa.

Applicant holds 180-day temporary authority issued May 10, 1967, to perform the operation proposed herein. It was formed in October 1966 and until obtaining the temporary authority was engaged principally in repairing and maintaining motor vehicle equipment and in the sale of tires and other vehicle replacement parts. At the time of the initial hearings in June 1967 it had handled 10 shipments under its temporary authority, of which 5 moved to Hoffman or its customers in the Los Angeles area and one moved to Bennett's customers in the San Francisco area.

Applicant's president, Stephen Levinson, for two years until January 1967 was president of California Marketing Cooperative, Inc., hereinafter called the Co-Op, when the latter was transporting shipments for Hoffman, Bennett, and others. Levinson's father is president of Hoffman. For about 12 years prior to the organization of the Co-Op Levinson was employed by Hoffman. Levinson is also president and sole stockholder of Tempo Leasing, Inc., which sub-leases to applicant five tractor-trailer units which are leased from Levinson. These vehicles were formerly under lease to Hoffman. They are now used only in the service of Hoffman on movements from midwestern points to California; however, they are used in transporting exempt commodities, principally produce, for other shippers in the reverse direction. Admittedly, an eastbound movement of such commodities is essential to the economic feasibility of the entire operation proposed. Applicant also operates four units which are owner-operated and which are dedicated to serving Bennett from

the midwest to California. All of the tractors have sleeper cabs and trailers are insulated, have extruded floors, and are equipped with meat rails and mechanical refrigeration units capable of maintaining temperatures at any point between zero and 70 degrees. Portable dividers are available to permit shipping of mixed loads of frozen and unfrozen commodities. At shippers' request, these vehicles are painted so as to advertise the respective company's products. The drivers of the above vehicles are paid on a combination of trip and mileage basis. Levinson also owns 30 tractors and 35 trailers which are leased to Hoffman, but which will be made available to applicant under long-term lease should "it find it necessary to increase the size of its fleet." Prior to leasing these vehicles to Hoffman 11 of the units were leased to the Co-Op. Since November 1966 applicant has maintained a terminal facility in Council Bluffs, Iowa, equipped for complete maintenance of all vehicles to be used in this operation. All equipment will regularly be routed through this terminal for systematic maintenance and inspection. When temporary authority operations were commenced it established a terminal and office facility in Vernon, Calif., next door to Hoffman's plant. At the time of the initial hearings herein, it was looking for a facility in the San Francisco area for serving Bennett.

At the hearing applicant's president had freight bills evidencing 7 shipments of meat for Hoffman between May 23 and June 3 and 5 shipments of produce. All of the meat shipments were truckloads and originated at a single point and were destined to Los Angeles. Several of these shipments moved in vehicles which have been designated as for the exclusive use of Bennett.

which was said to have resulted from the confusion of getting the operation started. Origins of the meat shipments were Harlan, Iowa Falls, and Sioux City, Iowa. Applicant is said to be "working to develop methods that will make shipping documents available immediately after delivery of the product to customers of our shippers and even though the shipment may not have yet reached the point where final unloading will occur"; however, such system has not yet been put into effect.

Applicant's balance sheet as of March 31, 1967 shows current assets of $15,522 and current liabilities of $5,828. For the first 3 months of 1967 it had a net profit of $2,753. Since the date of the balance sheet it has negotiated a bank loan of $25,000, which was arranged to assure availability of such funds as might be necessary to conduct these operations.

Wilsey Bennett Company purchases meat and meat products from packers in the Midwest and sells them to customers in California. All of the meat purchased is pork and pork products except for some carcass beef which is purchased "when the market is right." Although it has purchased as all of the points sought by this application, at the present time and for the foreseeable future its purchases are and will be predominantly in Iowa. From Fort Dodge it has received from 10 to 15 shipments during the past 6 months. Eight and Midwest Coast have been used although, during the past 2 or 3 months greater reliance has been placed on piggyback. From Cherokee it receives about one shipment a month which has been moving piggyback and by the Co-Op. Shipments from Storm Lake have been cut back to about 2 a month, transportation being

by Digby and Midwest Coast. Heretofore it has received 1 or 2 shipments a week from Waterloo primarily by piggyback; however, the supplier at that point is closing its plant. Nothing has been received from Dubuque in over a year and the witness did not know what service is available from that point. About one shipment a month is received from Cedar Rapids moving primarily by piggyback. Shipments from Ottumwa are sporadic and amount to no more than one every 6 weeks on the average. Piggyback is used on about 70 percent of those shipments and, although the witness did not remember the carriers used on the balance of that traffic, he knows that Digby and Little Audrey's are available. One shipment a week has been received from Perry, moving by Digby and a cooperative. Shipments from Des Moines amount to about 1 or 2 a week and have moved by Digby, Midwest Coast, and a cooperative. Very little is received from Wichita and nothing from Emporia or Hutchinson. From Kansas City it receive about 3 shipments during the 6 weeks prior to the hearing. From Scottsbluff only an occasional shipment is received, and none in over a year. Nothing has been received from Omaha in 6 months, and very little from York. From Fremont about 1 shipment in 3 months is received. From Chicago it receives 1 or 2 shipments a month, mostly by rail and piggyback. From the 5 Minnesota points involved it receives a total of about 1 shipment every 3 months. Nothing is received from Wisconsin. From 4 to 5 shipments a week are received from Sioux Falls by Digby, Midwest Coast, and a cooperative. Some traffic is received from Huron, although there is no regular movement. The average volume of these shipments is from 800

000 to 1,000,000 pounds per week, approximately 25 percent of which moves by rail and piggyback, 25 percent by motor common carrier, and the balance by a cooperative (Milk Producers Cooperative). However, during the period from May through part of August there is a heavy seasonal movement of frozen products which move about 40 percent by piggyback. It is estimated that Bennett would tender applicant a volume that would require up to 10 vehicles a week. No change in the volume of movement by rail or motor common carrier is anticipated if this application is granted, the traffic going to applicant being that previously handled by Milk Producers Cooperative. Its average truck shipment is 40,000 pounds. It has shipped to customers in the Los Angeles area and to San Francisco, Oakland, Richmond, San Leandro, San Jose, Modesto, Stockton, and Bakersfield, all of which are in the San Francisco area except Bakersfield. Shipper's customers frequently operate on short inventories and depend on it to effect delivery of their products at the time scheduled. Examples of the type of service expected are fourth morning delivery from Chicago and 48 to 52 hour delivery from Omaha. Many of its customers' orders are for less-truckload quantities and such shipments involve multiple pickup and delivery. Shipper also expressed a desire to place advertising on the vehicles used to deliver its products to customers; however, it does not have such advertising on its own equipment nor did it on the vehicles of the Co-Op when the latter was operated by Levinson. The services of existing motor common carriers are said to have been unsatisfactory in several respects, although no specific instances of service deficiencies were cited. Such car-

riers are frequently unable to provide equipment for loading at the points desired and they are often unable to serve all of the origin and destination combinations needed in forming truckload shipments. It also has found it impossible to obtain from these carriers copies of delivery receipts and other shipping documents necessary to collect from its customers immediately after delivery has been made. Although at the time of the initial hearings applicant had handled only one shipment under temporary authority (on June 2, from Des Moines to several points in the San Francisco area), shipper indicated that it is the type of service which it requires.

Hoffman Brothers Packing Company, Inc., purchases from 1,200,000 to 1,700,000 pounds a week of meat and meat products, including carcass meat and primal cuts, from so-called primary producers in the mid western States for sale to chain stores, jobbers, wholesale organizations, governmental installations, and various kinds of institutions located principally in California. Carcass meats are processed at its Los Angeles plant and inbound shipments must be coordinated with plant operations so as to prevent work stoppages and consequent overtime labor expenses. Its plant uses considerably more pork than beef and it has been a long time since it has received carcass beef from the mid west. It has in the past received shipments from Perry, Sioux City, Harlan, Dennison, Marshalltown, Iowa Falls, and Glenwood, Iowa, York, Dakota City, and Omaha, Nebr., Watertown, S. Dak., Wichita and Kansas City, Kans., Chicago, Ill., and Albert Lea and Worthington, Minn. Daily shipments are received from Sioux City, and Harlan, all at the Los Angeles plant

From Dennison it receives 2 to 3 shipments a week moving to Los Angeles, San Francisco and Red Bluff. The suppliers' plants at Glenwood and Marshalltown were closed down in 1967. About one shipment of carcass hogs a month is received from Iowa Falls and during the past 6 months it has received 1 shipment (in 1967) from Perry. From York about 2 shipments a week are received at the Los Angeles plant. Movements from Dakota City and Omaha are irregular and infrequent. Nothing has been received from Wichita in about 3 years or from Kansas City in over a year. From Chicago regular shipments of fresh meat cuts are received at Los Angeles. Nothing in recent years has been received from Worthington or from Albert Lea in approximately 18 months. The supplier at Watertown closed about 2 months prior to the initial hearings herein. At the present time shipments from Iowa, which are primarily from Sioux City, Harlan and Dennison, move by piggyback, by applicant, and in shipper's own vehicles. No investigation has been made of the available motor common carrier services from any of the States involved. The Chicago supplier selects the carrier and the witness did not know if applicant's service would be used from this point. Until recently practically all of this traffic moved directly to the Los Angeles plant where it was processed and distributed to customers; however, some shipments of pre-cut meat items have been moving from Dennison direct to customers in Los Angeles, San Francisco and Redding or Redwood, Calif., and it is seeking additional customers at other points where the same type of service could be provided. At the time of the initial hearings it was in the process of establishing storage facilities for cooling

and freezing in the San Francisco area. Once it is established a considerable amount of the traffic to that area will be stored at that point and orders subsequently made up therefrom. Some large orders will be delivered direct to customers and some partial loads will be transferred at San Francisco to smaller trucks for delivery to customers. It is also anticipated that some shipments will make split delivery to the San Francisco and Los Angeles facilities. Although the shipper witness was unable to designate any specific instances of service failures on the part of existing motor common carriers, the shipper is said to have been "singularly unsuccessful in our efforts to obtain service from motor common carriers that could be coordinated with the operations of our plant because product did not arrive at the time scheduled and we were unable to obtain advance information concerning the carriers inability to effect scheduled delivery." Attempts to use rail service, including piggyback service, proved unsatisfactory because of the inability to coordinate the transportation service with the plant operations. Its use of the Co-Op also proved unsatisfactory, though superior to that otherwise available, and when it terminated its transportation activities applicant was requested to seek appropriate authority to provide the service. Between the time the Co-Op ceased operations on January 1, 1967, and applicant obtained temporary authority, shipper began private carriage operations but the extent of those operations has been reduced on the strength of the service performed by applicant. The latter has been an adequate and effective substitute for private carriage and shipper will terminate all private carriage if the applicant is granted the authority

sought. It will, however, engage fully in private carriage if such authority is not granted.

Frozen Food Express, Inc., holds motor common carrier authority to transport (1) meat, meat products, and meat byproducts as defined in parts A and B of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, 61 M.C.C. 209, from Council Bluffs (which includes Omaha), Dubuque, and Ottumwa, Iowa, and Wichita, Kans., to points in California, (2) frozen meats, from the storage facilities utilized by Armour & Company at or near Worthington, Minn., to points in Texas, restricted to shipments originating at said storage facilities at or near Worthington, (3) frozen foods, from points in Minnesota to points in Texas, (4) meats, meat products, and meat byproducts, and articles distributed by meat packinghouses, as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates*, *supra*, from the plant site of Armour & Company near Worthington, Minn., to points in Texas, restricted to shipments originating at the plant site of Armour & Company near Worthington, (5) meats, meat products, meat byproducts, and articles distributed by meat packinghouses, as described in Appendix I to the report in *Descriptions in Motor Carrier Certificates*, *supra*, from Cudahy and Milwaukee, Wis., to points in Texas, (6) frozen foods and fresh meats from points in Iowa, Kansas and Nebraska to points in Texas, (7) meats, meat products, and meat byproducts, (a) from Wichita, Kans., to points in Texas, and (b) from points in Iowa (except Ottumwa), Nebraska, and Kansas, (except points in the Kansas City commercial zone), to points in Texas, (8) frozen foods, and meats, meat prod-

ucts, and meat byproducts as defined by the Commission from points in Illinois to points in Texas, and (9) meats, meat products, and meat byproducts and frozen foods, all in vehicles equipped with mechanical refrigeration, from points in Texas to points in California. By tacking parts (2) through (8) with part (9) in the Dalhart, Tex., area of the Texas Panhandle, operations are conducted from those origins to points in California. It is now conducting operations from various of the above origins to California and it is considered important traffic. It provides LTL and truckload service from Chicago to California and has handled some shipments from Chicago part of which were consigned to Hoffman. During the past year there has been a considerable decline in meat traffic handled by it from the midwest (Illinois, Iowa, Nebraska, Missouri, and Kansas) to California. In 1965 it handled a total of 912 truckloads of meat from those origins to California and in 1966 it handled 728 such shipments. During the first 5 months of 1967 it handled 270 such shipments. From those origins to California its gross revenue on meat traffic in 1965 was $308,511 and in 1966 was $228,575. An exhibit was submitted showing examples of meat shipments handled by it from and to the points involved from January 1966 through May 1967. Many of those shipments involved split deliveries as well as scheduled time deliveries. If a truck is delayed and will not arrive on time both the shipper and receiver are notified. Multiple pickup and delivery is a common requirement in its service for the meat industry. Protestant maintains its general offices at Dallas, Tex., and it has branch offices at, among other points, St. Louis, Mo., Kansas City, Kans.,

Omaha, Nebr., Chicago, Ill., and Montebello, Calif.; which are connected by leased wire service with its Dallas offices. It also has a wide area telephone service in Texas. By means of this communication set up, coordination and overall control of its operations is maintained at Dallas, although the actual dispatching of equipment is handled by the office nearest to the location of the equipment. It is also able to keep a tight control over the movement of equipment between the different areas of its operation and thereby reduce unnecessary deadheading. It operates 168 tractors (130 leased) and 203 trailers (27 leased). The tractors are all diesel powered and have sleeper cabs. The trailers are all equipped with mechanical refrigeration units which are capable of maintaining controlled temperatures ranging from minus 10 degrees to 70 degrees. It has a number of trailers which are specially designed compartment-wise so that it can maintain temperatures in different compartments at different levels. *Protestant would make special arrangements to supply* delivery receipts shortly after delivery if a shipper or receiver requested it. Its tariff provides for use of placards on vehicles stating the name of the shipper being served. It is not operating at capacity from the midwest to California and would like additional traffic.

Midwest Coast Transport, Inc., holds motor common carrier authority to transport (1) meats, meat products and meat byproducts and articles distributed by meat packinghouses as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, (a) from points in Iowa and Minnesota to Mitchell, S. Dak., (b) from Mitchell, S. Dak., to points in California, (2) meats, packing

house products, and commodities used by packinghouses as described in Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra,* (a) from Sioux Falls, S. Dak., to points in California, (b) from points in Wisconsin to Sioux Falls, (c) from Fremont, Nebr., to Mitchell, S. Dak., and (d) from Madison, S. Dak., to points in California, (3) general commodities, with the usual exceptions, from Omaha, Nebr., to Council Bluffs, Iowa, and (4) fresh meats and packinghouse products from Sioux City, Iowa, to points in Kansas (except Kansas City, Kans.). Parts (1)(a) and (2)(c) are tacked with part (1)(b) in operating from Iowa, Minnesota and Fremont, Nebr., via Mitchell, S. Dak., to points in California. Parts (3), (1)(a), and (1)(b) are combined or tacked at Council Bluffs, Iowa, and Mitchell, S. Dak., in operating from Omaha to points in California. In handling shipments from Chicago and Momence, Ill., it would interline with originating carriers at Sioux Falls, S. Dak., and transport the shipments to California under part (2)(a). Shipments originating in Wisconsin would be transported by protestant uder part (2)(b) to Sioux Falls and there interlined with All-American Transport, Inc., a commonly controlled carrier, which would transport the shipments from Sioux Falls to Mitchell, S. Dak., and there again interline with protestant for transportation under part (1)(b) from Mitchell to points in California. From Huron and Watertown, S. Dak., shipments would orignate with All-American and be interlined with protestant at Mitchell, S. Dak., for transportation to California under part (1)(b). Any service that protestant could perform from Scottsbluff, Nebr., would be too circuitous. Its main office is at

Sioux Falls, S. Dak., and it has branch offices at Austin and St. Paul, Minn., Omaha, Nebr., Ottumwa, Iowa, Sioux Falls, S. Dak., Schererville, Ind., and San Leandro, Calif., (in the San Francisco area). All of these offices are connected by telephone and teletype. It operates 165 tractors, all of which are diesel powered and equipped with sleeper cabs, and 176 trailers equipped with mechanical refrigeration units capable of maintaining temperatures between zero and 70 degrees. The trailers also have meat rails and have dividers for transporting frozen and unfrozen products at the same time. From January 28, 1966, through May 8, 1967, it transported 42 shipments for Bennett weighing a total of 1,653,705 pounds, for which it received a revenue of $39,994, from points in Iowa, Minnesota and South Dakota to points in California. Six of those shipments were originated by All-American and interlined with protestant for delivery. It has handled no traffic for Hoffman for at least 3 years. Protestant submitted a representative list of shipments of meat and packinghouse products transported by it from Iowa, Minnesota, Nebraska, South Dakota, Wisconsin, and Chicago, Ill., to California during the last four months of 1966, which showed a total volume of 10,104,336 pounds, for which it received a total revenue of $257,360. Many of the shipments reflected in that list involved split deliveries to some points outside California and many involved interline movements. For Bennett it handled 32 shipments in 1964, 13 in 1965, 23 in 1966, and 24 during the first 5 months of 1967. When occasionally requested to do so, it has notified Bennett after the first delivery has been made on a shipment.

income, San Jose, and San Francisco, Calif., Chicago, Ill., Kansas City, Mo., Omaha, and Scottsbluff, Nebr., Denver, Colo., and Salt Lake City, Utah. Protestant submitted a list of representative shipments of packinghouse products transported by it from the consignees to California points between July and December 1960. A substantial number of these shipments involved interline with Midwest Coast and two carriers not parties hereto and many involved split delivery service to four destinations. From January 27 to June 9, 1961, it transported 12 shipments of electric motors weighing 14,850 pounds for Bennett from Los Angeles to western and midwestern destinations. From January through April 1961 it transported 17 shipments of smoked meats and sheet bacon weighing 23,800 pounds for Hormel from Los Angeles to Salt Lake City. No complaints were received from either shipper. It admits both shippers regularly from the midwest to California but is handling no such traffic at the time. It provides 4-split delivery service and scheduled deliveries. Kingsley Pacific, Limited, is owned and operated by the same Kingsley owner and its four carriers have joint interline and interchange of equipment agreements and engage in joint solicitation efforts including through service by their Kingsley Pacific operating terminals in California between San Diego and San Francisco, serving numerous intermediate points. Pacific originates for Kingsley and delivers to a point or points served by Kingsley Pacific is interchanged in California and the equipment and drivers move on through to destination.

W. J. Digby, Inc., of Texas holds motor contract carrier authority to transport [illegible] packinghouse

tion arrangements with several carriers not parties hereto. It operates 20 tractors with sleeper cabs, and 28 trailers, the latter being 45 feet long and equipped with meat rails and with mechanically refrigerated units. Terminals are maintained at Salt Lake City, Storm Lake, and Los Angeles. Digby submitted a list of meat shipments handled by it during December 1966 and the first 8 months of 1967 from origins involved to points in California. Many of those shipments involved interlining at origin and or destination, including shipments originating at Chicago and interlined at Dubuque for delivery by protestant in California without a stop in transit. For Bennett it handled 42 loads from the origin area sought to California in 1966 and 44 loads during the first 10 months of 1967. Approximately 3 months prior to the hearing in July Bennett discontinued using Digby allegedly because of rates. Prior thereto it served Bennett on a substantial scale without complaint. Delivery receipts were mailed to that shipper after each delivery. Digby's predecessor transported 501 loads for Hartman in 1963. In 1965 Digby handled 2 loads for Hartman, and none in 1966 or during the first 8 months of 1967. The 1964 loads originated at Denison, Hayfield, Iowa Falls, and Sioux City, Iowa. When it purchased the stock of its predecessor in January 1965 Digby's representatives checked the records of that carrier and in February 1965 submitted to Hartman a bill for undercharges on traffic handled in 1964 in the amount of approximately $38,000. Since that time it has been tendered no traffic by Hartman. It has tariff provisions for placarding vehicles with shipper's name and provides scheduled deliveries when desired. The considered traffic from the midwest to the West Coast is the heart of its operation. It has

experienced severe competition from the cooperatives, piggyback service, and the institution of a contract carrier service. It now has about 25 vehicles a week in this area and desires to handle all of the traffic that would be tendered to it. It has had to lease some of its vehicles to other carriers from Iowa and Nebraska to southern and eastern points not served by it.

Vitalis Truck Line holds authority to transport such merchandise as is dealt in by wholesale, retail, and chain grocery and food business houses, and in connection therewith, materials, equipment and supplies used in the conduct of such business, between Fremont and Omaha, Nebr., and points in Iowa, restricted to shipments moving from, to, or between warehouses, and wholesale, retail, or chain outlets of grocery and food business houses. In addition to the foregoing authority, the parties stipulated that Vitalis is a party to the interline arrangement hereinbefore referred to in connection with W. J. Digby of Iowa.

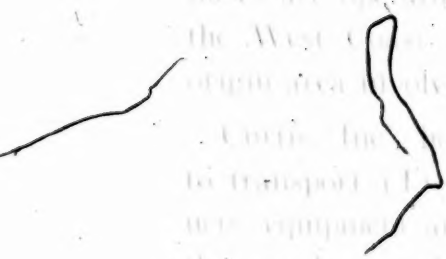
Midwest Luxury Freight System, Inc., holds motor common carrier authority, as pertinent here, to transport (1) foodstuffs, raw and manufactured, between points in Illinois, (2) general commodities, over specified regular routes from Chicago to Rock Island, Ill., (which includes Davenport, Iowa), (3) such merchandise as is dealt in by wholesale food business houses, and in connection therewith equipment, materials and supplies used in the conduct of such business from points in Wisconsin to Chicago, and (4) general commodities, with the usual exceptions, over described regular routes between Chicago and St. Paul, serving Eau Claire, Wis., among other points. It has terminals at a number of points, including Austin and St. Paul,

Minn., Cedar Rapids, Council Bluffs, Davenport and Perry, Iowa, Chicago, Streator, and Waukegan, Ill., Kansas City, Kans., and McFarland, Wis.

Uhlk Andrew Transportation Company, Inc., is controlled by Midwest Livery and holds authority, as pertinent here, to transport (1) meats, meat products, and meat byproducts as defined in Section A of Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, (a) from Chicago, Mason City, and Sioux City, Iowa, Kansas City, Kans., St. Paul, Minn., Omaha, Nebr., and Huron, S. Dak., to points in California, and (b) from Madison, Wis., Austin, Minn., and Davenport, Waterloo, Fort Dodge, Estherville, and Storm Lake, Iowa, to San Diego, Los Angeles, San Jose, San Francisco, Stockton, and Sacramento, Calif., (2) meats, meat products, and meat byproducts, and articles distributed by meat packinghouses, as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, from Des Moines, Iowa, to points in California, (3) the commodities classified as meats, meat products, and meat byproducts, and articles distributed by meat packinghouses, as described in Sections A and C of the Appendix to the report in [illegible] from Topeka, Kans., to Los Angeles, Oakland, and Ducor, and San Francisco, Calif., and (4) general commodities, with certain exceptions, not relevant here, over irregular routes between Omaha and Fremont, Nebr., Fremont, as served by tacking (1) and (2) above, and (3) the high-angle route between Fremont, Nebr., as served by interlining with Midwest Livery at Chicago, Ill., Davenport, and Mitchellville, Iowa, Wisconsin points can be served by interlining with

Midwest Emery at Chicago. Eau Claire is served by interlining with Midwest Emery at St. Paul. The following points are served by interlining with other carriers not parties hereto: Madison, Sioux Falls, Watertown, and Mitchell, S. Dak., by interlining at Huron, S. Dak.; Wichita and Hutchinson, Kans., by interlining at Topeka or Kansas City; Albert Lea by interlining at Storm Lake, Iowa; and Worthington by interlining at Sioux City. It operates under long-term lease 150 tractors and 127 insulated trailers equipped with mechanical refrigeration units capable of maintaining temperatures from sub-zero to 70 degrees. Terminals are maintained at Fremont, Nebr., Chicago, St. Paul, Council Bluffs, Iowa, Kansas City, Kans., San Francisco and Norwalk, Calif., Seattle, Wash., and Salt Lake City. It also has a number of check points in Iowa, South Dakota, Nebraska, Nevada, Wyoming, New Mexico, Arizona, California, Montana, Washington, and Idaho, where drivers are required to record the time of their stop sheets. If shippers or receivers so desire, they will be advised daily or more often of the progress of their shipments. It can provide shippers with delivery receipts, a copy being mailed to the driver or brought to the terminal for mailing; however, the practice is not required by many customers. Most receivers specify the time they expect deliveries and no time guarantee had 99 percent compliance with time deliveries. It provides pick-up and delivery service and will station equipment at a production point if there is sufficient traffic to be available to warrant it. Its vehicles will be placarded with shippers name if desired. Under any of the original 3 lists of representative shipments handled by it from intrastate origins (Iowa, Nebraska, South Da-

kota, Kansas, Illinois, Minnesota and Wisconsin) to California during the first 5 months of 1967. Included in that list are interline shipments and split pickup and delivery shipments. It includes 2 shipments handled for Bennett & Co. which were interline and for which a receiver is complaining. It selects fresh shippers regularly but has received no traffic from Hastings. The transportation of meat and packinghouse products constitutes about 80 percent of its total revenue. Its vehicles are operating at about 80 percent of capacity to the West Coast and it has about 80 vehicles in the origin area involved.



Certificate No. 9 holds motor common carrier authority to transport dressed fresh meats and packinghouse products, equipment and supplies when moving to or from the warehouse, plants or other facilities of meat packinghouses over described regular route between Denver, Colo. and Chicago, Ill., serving the intermediate points of Omaha, Nebr. and Des Moines, Iowa, and the off-route point of Council Bluffs, Iowa. It transports meat products and meat byproducts and articles distributed by meat packinghouses as described in Sections A and C of Appendix I to the report in Descriptions in Motor Carrier Certificates, 61 M.C.C. 209 and 766 (but excluding hides and pelts, in bulk, from the facilities of packinghouses and those articles which because of their size or weight require the use of special equipment), restricted to the transportation of traffic originating at the plantsite and storage facilities of Wilson & Co., Inc. at or near Cheyenne, Iowa or Denver, Colo. and destined to points in Illinois, Iowa, Minnesota, Nebraska, South Dakota and Wisconsin. It holds no authority from the Interstate Commerce Commission to conduct any operations between points in the United States in Alaska or Hawaii.

in Motor Carrier Certificates, supra, from Denver and Greeley, Colo., to points in California, subject to the restrictions that the authority granted shall not be tacked or joined with any other authority now held by the carrier for the purpose of providing through service. Although Curtis maintains that it can tack parts (3) and (4) above at Denver, the restriction in (4) prohibits such tacking inasmuch as that authority was acquired after that in part (3). It has trailer interline arrangements with other motor carriers not parties hereto, on traffic originating at York, Omaha, Fremont and Scottsbluff, Nebr., Wichita, Hutchinson and Kansas City, Kans., and the Kansas cities. It operates 150 tractors and over 200 trailers, the majority of the trailers being 40 feet in length and equipped with mechanical refrigeration units. It also has on order six so-called double bottoms (two 27 foot trailers pulled by one tractor) which are particularly useful on shipments involving multiple pickups and deliveries. Terminals are maintained at Chicago, Sioux City, Omaha, Lexington, Nebr., Denver and Los Angeles. Every driver must call central dispatch in Denver every morning between 8 and 10 o'clock to report his location. Any breakdown not repairable within 30 minutes must be reported to Denver, which will make available another vehicle at the earliest possible time. Protestant will provide copies of delivery receipts to shippers, as it has done so for Bennett in serving that shipper from Denver until the plant closed sometime during the latter

part of 1966 or early 1967. Before that time it handled approximately 100,000 pounds a week for Bennett from Denver. It has handled a small volume for Bennett since that time. It has handled a small amount of traffic for Hoffman from Denver. It solicits both shippers. Scheduled timed deliveries are provided. At present it relies on exempt products (fresh fruits and vegetables) for 95 percent of the return move from California. Pork products move consistently all year to the West Coast and is considered very desirable traffic.

W. J. Digby, Inc., holds motor common carrier authority to transport meats, meat products and meat by-products and articles distributed by meat packinghouses as described in Sections A and C of Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, from Denver, Colo., to points in California, by which it interlines with a carrier not a party hereto traffic originating in Iowa, Nebraska, and Illinois. Those carriers provide a through trailer movement under that operation. At the time of the hearing in July it had temporary authority to transport meats, meat products, meat by-products and articles distributed by meat packinghouses as described in Appendix I to the report in *Descriptions in Motor Carrier Certificates, supra*, from Sioux City, Iowa and Dakota City, Nebr., to points in California, and had an application for corresponding permanent authority pending. It operates 12 tractors with sleeper cabs and 30 trailers equipped with meat rails and mechanical refrigeration units.

Terminals are maintained at Denver, Los Angeles, Phoenix and Salt Lake City and check points at Cheyennee, Wyo., and Las Vegas and Reno, Nev.

Briefs were filed by applicant, by protestant Frozen Food Express, and jointly by protestants Midwest Coast, Refrigerated Foods, Ringsby, Digby, Digby of Iowa, Curtis, Midwest Emery, and Little Audrey's. Those briefs have been considered in full by the examiner.

Applicant here proposes to serve under continuing contracts two shippers, and to assign vehicles to those shippers' exclusive use. Thus, the operation proposed is that of a contract carrier by motor vehicle as defined in section 203(a)(15) of the act. In determining whether the issuance of a permit will be consistent with the public interest and the national transportation policy, section 209(b) of the act requires that consideration be given to the number of shippers to be served, the nature of the services proposed, the effect which granting the permit would have upon the services of protesting carriers, the effect of a denial upon the applicant and the supporting shippers, and the changing character of the shippers' requirements.

The situation here involves a recently organized corporation seeking to provide for one shipper (Hoffman) a service which that shipper has provided largely in private carriage operations, though to some extent by agricultural cooperatives, and for another shipper (Bennett) a service which has been provided largely by a co-

operative, but also by motor common carriers (including some protestants) and by piggyback operations. Regarding the nature of the service proposed, applicant has failed to establish that there is anything distinct or specialized about the service that differs essentially from that offered by motor common carriers, or that applicant is better able to meet the shippers' transportation requirements than are protestants. Protestants are authorized to provide service to most points sought by the application and some of them are transporting a portion of the involved traffic for Bennett. Although the shippers complain that they need a carrier authorized to serve all of the points and areas sought, particularly in order that multiple pickups and deliveries can be made, and willing and able to provide such accessorial services as placing advertising on the vehicles used and providing copies of delivery receipts and other shipping documents immediately after delivery of the shipments, the shippers have failed to establish that protestants are unable or unwilling to provide such services. Neither shipper has shown any particular familiarity with the services afforded by existing carriers and Hoffman appears to have made virtually no effort to utilize those services. The record thus fails to show that these shippers have any distinct needs which can better be met by applicant than by the protestants.

A grant of the application could adversely effect the operations of existing carriers inasmuch as a portion

of the traffic (that of Bennett) would be subject to diversion. On the other hand, a denial of the application would have no apparent adverse effect upon applicant, except insofar as it is now handling a limited amount of the traffic under temporary authority, as it would be left in its present position. And lastly, there is no evidence regarding any significant change in the character of either shipper's requirements that protestants would be unable or unwilling to meet. It is therefore concluded that the application should be denied.

Upon consideration of all evidence of record, the examiner finds that the granting of the authority sought by applicant would not be consistent with the public interest and the national transportation policy.

In view of the findings herein, the examiner recommends that the appended order be entered.

By James A. McKiel, Hearing Examiner.

(Signature) James A. McKiel
Recommended by James A. McKiel,
Hearing Examiner
(Signature) James A. McKiel

ORDER

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, held at its office in Washington, D. C., on the day of

A. D. 1967.

No. MC-128732 (Sub-No. 1)

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC. CONTRACT CARRIER APPLICATION

Investigation of the matters and things involved in this proceeding having been made, said application upon due notice having been heard by the examiner, who has made and filed a report herein containing his findings of fact and conclusions thereon, which report is hereby made a part hereof, and said proceeding having been duly submitted:

It is ordered, That the said application be, and it is hereby, denied.

And it is further ordered, That this order shall be effective on

By the Commission, division 1.

H. NEIL GARSON,
Secretary.

(SEAL)

EXHIBIT C.

Decision and Order.

SERVICE DATE
APRIL 30, 1968

At a Session of the INTERSTATE COMMERCE COMMISSION, Review Board Number 3, held at its office in Washington, D.C., on the 18th day of April, 1968.

No. MC-128732 (Sub-No. 1)

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., CONTRACT CARRIER APPLICATION

(Beverly Hills, Calif.)

Upon consideration of the application and the record in the above-entitled proceeding, including the report and recommended order of the examiner, the exceptions filed by applicant and the replies filed jointly by protestants Midwest Emery Freight System, Inc., and Little Audrey's Transportation Co., Inc., and jointly by Midwest Coast Transport, Inc., Refrigerated Foods, Inc., and Ringsby Truck Lines, Inc., W. J. Digby, Inc., of Iowa, W. J. Digby, Inc., and Curtis, Inc., and separately by Frozen Food Express, Inc.; and

It appearing, That the examiner recommended that the application be denied;

It further appearing, That the examiner in his report gave consideration to the statutory factor of the effect of a denial of the application on the supporting

shippers herein ((Section 209(b) of the Interstate Commerce Act)) and implied that such denial would have no apparent adverse effect on them in view of the available and apparently adequate service of protestants herein, but that he failed expressly to so conclude)

It further appearing, That the record herein warrants the conclusion that the denial of this application will have no apparent adverse effect on shippers in view of the available and apparently adequate service of protestants herein;

And it further appearing, That the pleadings present no new or material matters of fact or law not adequately considered and properly disposed of by the examiner in his report, and are not of such nature as to require the issuance of a report discussing the evidence in the light of the pleadings;

Wherefore, and good cause appearing therefor:

We find, That the conclusions of the examiner should be, and they are hereby, modified to reflect a conclusion that a denial of the application will have no apparent adverse effect upon the shippers in view of the available and apparently adequate service of the protestants herein;

And we further find, That the evidence considered in the light of the pleadings does not warrant a result different from that reached by the examiner; and that the statement of facts, the conclusions, and the findings of the examiner in his report, as modified herein,

being proper and correct in all material respects, should be, and they are hereby, affirmed and adopted as our own; and

It is ordered, That said application be, and it is hereby, denied.

By the Commission, Review Board Number 3, Members Mulhern, Merrill, and Bilodeau.

H. NEIL GARSON,
Secretary.

(SEAL)

EXHIBIT D.

Order.

SERVICE DATE
AUGUST 16, 1968

At a Session of the INTERSTATE COMMERCE COMMISSION, Division 1, Acting as an Appellate Division, held at its office in Washington, D. C., on the 29th day of July , A.D. 1968.

No. MC-128732 (Sub-No. 1)

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC. CONTRACT CARRIER APPLICATION

(Beverly Hills, Calif.)

Upon consideration of the record in the above-entitled proceeding, and of:

(1) Petition of applicant, filed May 31, 1968, for reconsideration or, in the alternative, reopening of the proceeding for the purpose of receiving additional evidence tendered in the form of a verified statement by Stephen Levinson,

(2) Petition of Hoffman Brothers Packing Company, Inc., filed May 31, 1968, for leave to intervene, embracing a tendered petition for reconsideration and for reopening of the proceeding for receipt of additional evidence in the form of a tendered verified statement by Robert Levinson;

(3) Joint reply by Midwest Emery Freight System, Inc., and Little Audrey's Transportation Co., Inc., protestants, filed June 20, 1968, to the

petition in (1) and (2) above, embracing a motion to strike portions of said petitions;

(4) Reply by Frozen Food Express, protestant, filed June 20, 1968, to the petition in (1) above;

(5) Reply by Frozen Food Express, protestant, filed June 20, 1968, to the petition in (2) above;

(6) Joint reply by Midwest Coast Transport, Inc., Refrigerated Foods, Inc., Ringsby Truck Lines, Inc., W. J. Digby, Inc., of Iowa, W. J. Digby, Inc., and Curtis, Inc., protestants, filed June 24, 1968, to the petition in (1) and (2) above insofar as they seek relief other than intervention;

(7) Joint reply by Midwest Coast Transport, Inc., Refrigerated Foods, Inc., Ringsby Truck Lines, Inc., W. J. Digby, Inc. Of Iowa, W. J. Digby, Inc., and Curtis, Inc., protestants, filed June 24, 1968 to the petition in (2) above; insofar as it seeks leave to intervene;

and good cause appearing therefor:

It is ordered, That petitioner in (2) above be, and it is hereby permitted to intervene is said proceeding with the right to appear and participate in all further proceedings therein.

It is further ordered, That the tendered petition in (2) above be, and it is hereby, accepted for filing.

It is further ordered, That the said petitions in all other respects be, and they are hereby denied for the reasons (a) that the findings of Review Board Number 3 are in accordance with the evidence, (b) that,

even if the proceedings were reopened for the receipt of the evidence as set forth in the pleadings of applicant and Hoffman Brothers Packing Company, concerning their operations subsequent to the conclusion of the hearings held in this proceeding, such evidence would not warrant a result different than that reached in the decision and order of Review Board Number 3, of April 18, 1968, and (c) that no sufficient or proper cause appears for reopening the proceeding for reconsideration or further considering the matter.

It is further ordered, That in view of our action in the preceding paragraph the motion in (3) above be, and it is hereby, overruled.

By the Commission, Division 1, acting as an Appellate Division.

H. NEIL GARSON,
Secretary.

(SEAL)

EXHIBIT E.

Federal Statutes.

Interstate Commerce Act, as amended, 49 U.S.C. 1, et seq.:

National Transportation Policy (54 Stat. 899 [preceding 49 U.S.C. Section 1.] (1940)):

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulations of all modes of transportation subject to the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title), so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences of advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act (chapters 1, 8, 12, 13, and 19 of this title) shall be administered and enforced with a view to carrying out the above declaration of policy.

* * * *

Section 309. Permits for Contract Carriers by Motor Vehicle.

(a)(1) Except as otherwise provided in this section and in Section 310a, no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission, authorizing such person to engage in such business. . . .

(b) . . . Subject to Section 310, a permit shall be issued to any qualified applicant therefor, authorizing in whole or in part the operations covered by the application, if it appears from the applications or from any hearing held thereon, that the applicant is fit, willing, and able properly to perform the service of a contract carrier by motor vehicle, and to conform to the provisions of this part and the lawful requirements, rules, and regulations of the Commission thereunder, and that the proposed operation, to the extent authorized by the permit, will be consistent with the public interest and the national transportation policy declared in this Act:

In determining whether issuance of a permit will be consistent with the public interest and the national transportation policy declared in this Act, the Commission shall consider the number of shippers to be served by the applicant, the nature of the service proposed, the effect which granting the permit will have upon the services of the protesting carriers and the effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements. . .

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SEP 8 1969
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 451

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., A CORPORATION, *Appellant,*

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOOD EXPRESS INC., AND YELLOW FREIGHT SYSTEM, INC. (SUCCESSOR TO WATSON-WILSON TRANSPORTATION CO., INC.), *Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

MOTION TO AFFIRM.

DAVID AXELROD,
Attorney for Appellees Little Audrey's Transportation Co., Inc., and Yellow Freight System, Inc. (Successor to Watson-Wilson Transportation Co., Inc.)

Of Counsel:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969.

No. 451.

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., A CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOOD EXPRESS INC., AND YELLOW FREIGHT SYSTEM, INC. (SUCCESSOR TO WATSON-WILSON TRANSPORTATION CO., INC.),

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA.

MOTION TO AFFIRM.

Appellees move the Court to affirm the judgment sought to be reviewed on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

Rule 16(1)(c) authorizes filing a Motion to Affirm the judgment sought to be reviewed on appeal from a Federal Court for the above-stated cause.

NO SUBSTANTIAL QUESTION HAS BEEN PRESENTED BY APPELLANT.

Rule 15(1)(f) requires "a statement of the reasons why the questions presented are so substantial as to require plenary consideration with briefs on the merits and oral argument for their resolution." While Appellant at pages 3-4 of its Jurisdictional Statement alleges eight questions, its argument indicating why plenary consideration is necessary, consists of five numbered, frequently overlapping and repetitive, arguments, all of which were presented and argued in detail by appellant and rejected by the District Court.

Appellant's first argument misconstrues the meaning and relationship of Sections 203(a)(15) and 209(b) of the Interstate Commerce Act (49 U. S. C. Section 303(a)(15) and 49 U. S. C. Section 309(b), respectively). It is clear from Appellant's statement that it is arguing that once it has established by the evidence that it is proposing to assign motor vehicles to the exclusive use of the shipper, the issue of whether or not the proposed service is designed to meet a "distinct need" of the shipper is no longer material or relevant (Appellant's Statement, pages 12-14). In effect, the Appellant is saying that the issue of the "distinct need" of the shipper involved is not an element included in the criteria provided under Section 209(b) of the Act. The Appellant is obviously misguided in this regard.

As stated in the often cited case of *Interstate Commerce Commission* v. *J-T Transport Co., Inc.*, 386 U. S. 81 (1960), at page 88:

> "It seems clear from these provisions that the adequacy of existing service is a criterion to be considered by the Commission, as it is instructed to consider 'the effect which granting the permit would have upon the

> services of the protesting carriers,' as well as the effect of a denial upon the shippers. Or to put the matter otherwise, the question of the need of the shipping public for the proposed service necessarily includes the question whether the extent, nature, character, and suitability of existing, available service makes the proposed service out of line with the requirements of the national transportation policy. But the adequacy of existing facilities or the willingness or ability of existing carriers to render the new service is not determinative. The 'effect which denying the permit would have upon the applicant and/or its shipper and the changing character of that shipper's requirements' has additional relevance. This is a phase of the problem reflected in the broadened definition of 'a contract carrier by motor vehicle'—one who furnishes transportation services 'designed to meet the distinct need of each individual customer.' Section 203(a)(15). *It means, we think, that the 'distinct need' of shippers for the new contract carrier service must be weighed against the adequacy of existing services.*" (Emphasis added.)

It is obvious from the Report and Orders of the Commission that its consideration of the "distinct needs" of the shipper was related to its consideration and balancing of all the criteria under Section 309(b), in its effort to reach a determination whether the issuance of the permit would be consistent with the public interest and the national transportation policy. This is consistent with the holding in the *J-T* case.

Appellant also appears to attach some significance to that portion of the District Court Order which indicated that the Review Board in its Decision and Order considered the application to be for one shipper whereas the Appellant did not amend its application to delete its request to serve the second shipper until after the Board's decision. This inadvertent error in the Court's factual

recitation is of no moment, for the essential fact dealt with by the Court and the basis on which the Court decided the appeal was that Appellant sought to serve a single shipper.

Nor can there be any doubt but that the Commission gave full consideration to the shipper Hoffman's needs as well as those of the shipper Wilsey-Bennett whom Appellant subsequently amended out of the application. In fact, the Examiner devoted a full page to the discussion of each of the shippers' testimony and his findings clearly take note of the individual needs and desires of both the shipper Wilsey-Bennett and the Shipper Hoffman. After discussing these needs, the Examiner stated:

> "*Neither* shipper has shown any particular familiarity with the service afforded by existing carriers and *Hoffman* appears to have made virtually no effort to utilize those services." (Exhibit B to Statement, page 31, Emphasis added.)

Appellant's argument as to the importance to be attached to the fact that it proposes to serve a single shipper is contradictory. It argues, and subsequently repeats the same argument, that, on the one hand, the Commission gave undue consideration and emphasis to certain of the Section 309(b) criteria and that such undue consideration and emphasis is repugnant to the *J-T* case. On the other hand, however, the appellant then argues that since it will serve but one shipper, it has made the strongest possible showing for contract carrier authority. Appellant would have the Commission give undue consideration and emphasis to the first criteria in Section 309(b) while condemning the Commission's alleged undue consideration and emphasis on other criteria in Section 309(b). Obviously, the argument is inconsistent and fails to acknowledge that the Commission's function in determining applications under the Section 309(b) criteria is to balance all factors effect-

ing the listed criteria without giving undue preference to any.

In its second argument, Appellant invokes the due process clause of the Fifth Amendment to the U. S. Constitution (Statement, pages 14-16). No case is cited to support Appellant's position that the application of 49 U. S. C. 309(b) as construed and applied herein is repugnant to the due process clause. The argument overlaps, to a considerable extent, the first argument presented in the Statement. It is Appellant's position that the Commission's decision, and that of the District Court by adoption of the Commission's decision, was arbitrary, discriminatory and unlawful and, therefore, a denial of due process because Appellant was allegedly required to establish inadequacy of existing services as well as proof of service of a type not performed by common carriage. The Commission did not require Appellant to establish those factors, although the ability of the common carriers to perform the service was properly considered by the Commission. Appellant implies that it was its duty to establish the inadequacy of existing service and that there was a presumption that the service was adequate absent an affirmative showing to the contrary by Appellant. Neither the Commission nor the Court imposed such a duty on appellant, and, indeed, that presumption was condemned by the Supreme Court in the *J-T* case. However, this does not mean that the Appellant escaped the burden of rebuttal when the protestants presented evidence of their ability and willingness to satisfy the transportation needs of the shipper. In fact, that burden is specifically assigned to applicants by the Supreme Court in the *J-T* case:

> "The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to

> show they have the ability as well as the willingness to meet that specialized need. *If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.*" (*I. C. C. v. J-T Transport Co., Inc.*, 368 U. S. 81, at page 90. (Emphasis added.)

The Appellant would have the Court believe that the Commission in reaching its decision indulged in a presumption that the existing services were adequate to meet the transportation requirements of the shipper and thereby assigned the Appellant the improper and impossible burden of proving the inadequacy of the existing service, all in violation of the due process clause. It is apparent that the Commission did no such thing. No mention of a presumption is made. The protestants presented evidence of their ability to service the transportation needs of the shipper, and the Commission's findings refer *to the applicant's failure* to establish anything distinct about the service needed by the shipper from that provided by the protestants. When the protestants presented evidence on these matters, then and at that time the burden shifted to the Appellant to demonstrate that it was better equipped to meet the needs of the shipper than protestants. The Appellant failed to put such evidence into the record.

Appellant in this argument is clearly quarreling with the result of the Commission's exercise of its administrative discretion rather than any substantial federal question. The Commission's decision was not arbitrary and discriminatory, nor did it place upon Appellant an unlawful burden in violation of due process. It does not make adequacy of existing service a conclusive ground for denying applications of carriers who propose to serve one shipper or a limited number of shippers by assigning vehicles to his (their) exclusive use for continuing periods of time. Nor

does it, as Appellant would have, make as a conclusive ground for granting the application, the fact that the Appellant would serve one shipper by assigning vehicles to its exclusive use. No one of the criteria in Section 309(b) is by itself, conclusive grounds for granting or denying an application, and the Commission in this proceeding, as is evident from its orders, considered all five criteria in reaching its ultimate decision.

In its third argument, the Appellant apparently argues that where an applicant is a contract carrier as defined in Section 303(a)(15)(a), it need not meet or satisfy those criteria in Section 309(b) which provide that the Commission in determining whether a permit will issue shall consider "the nature of the service proposed" or "the effect which granting the permit will have upon the services of the protesting carriers." No citation in support of the argument is provided by Appellants and no substantial reason is given why those two particular criteria should be read out of Section 309(b). It obviously is the intent of the section that all five criteria be considered in deciding an application under Section 309(b), regardless of whether the applicant is a contract carrier by virtue of Section 303(a)(15)(a) or Section 303(a)(15)(b). If different criteria were to be applied, certainly some hint to that effect would have been inserted into the statute.

The Appellant's fourth argument to the effect that the Commission and the District Court below erred in manifesting a "special solicitude for that criterion which directs attention to the situation of protesting carriers * * *" is repetitive of prior arguments made in the Statement and is, in reality, an argument based upon its disagreement with the decision rendered by the Commission rather than its manner of reaching it (Statement, pages 4-5). The Commission did not ignore the effect which denying the permit would have upon the Appellant or its shipper. With

respect to the Appellant, the Examiner found, and the Commission adopted that:

> "On the other hand, a denial of the application would have no apparent adverse effect upon applicant, except insofar as it is now handling a limited amount of the traffic under temporary authority, as it would be left in its present position." (Exhibit B, page 32; Exhibit C, page 35.)

While the Examiner did not specifically make a finding as to the effect a denial of the application would have on the shippers, this finding was made by Review Board Number 3 by its Decision and Order (Exhibit C, pages 34-35). The fact that subsequently the Appellant, by its own act, deleted its request to serve one of its two remaining shippers cannot make the Commission's use of the word "shippers" in place of the singular form of any significance. "Shippers" as used by the Review Board obviously included the shipper Hoffman and, therefore, the Commission did consider the fourth criterion under Section 309(b).

The final argument by Appellant attacks the Commission's decision and that of the District Court for failure to properly consider the fifth factor in Section 309(b). As is apparent from Appellant's own argument, the Commission considered the changing character of the shippers' requirements and found that there was none. Appellant's argument under this issue, as with most of the preceding issues, is misplaced. It expresses only disagreement with the conclusions reached by the Commission and the District Court and, therefore, is only relevant to the question of whether there is substantial evidence to support the Commission's finding. It does not raise any substantial federal question and cannot be the basis for any further argument.

The United States Supreme Court has consistently held that orders of the Commission should not be set aside, modified, or disturbed by a court on review, if they lie

within the scope of the Commission's statutory authority, and are based upon adequate findings which are supported by substantial evidence upon the record as a whole, even though the court might have reached a different conclusion on the facts presented. *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515, 535-36 (1946); *Rochester Telephone Corp.* v. *United States*, 307 U. S. 125, 138-40 (1939); *Mississippi Valley Barge Lines Co.* v. *United States*, 292 U. S. 282, 286-87 (1934); *Interstate Commerce Commission* v. *Union Pacific Railroad*, 22 U. S. 541, 547-48 (1912); *Illinois Central Railroad* v. *Interstate Commerce Commission*, 206 U. S. 441, 454-55 (1907).

In the recent case of *Consolo* v. *Federal Maritime Comm'n*, 383 U. S. 607 (1966), the Supreme Court at page 619 succinctly defined the role of a court in reviewing a decision of an administrative agency:

> "Section 10(e) of the Administrative Procedure Act (5 U. S. C. Sec. 1009(e) (1964 ed.)) gives a reviewing court authority to 'set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, (or) an abuse of discretion * * * (or) (5) unsupported by substantial * * *.'" Cf. *United States* v. *Interstate Commerce Comm'n.*, 198 F. 2d 958, 963-964, cert. denied, 344 U. S. 893. We have defined 'substantial evidence' as 'such relevant evidence as reasonable minds might accept as adequate to support a conclusion.' *Consolidated Edison Co.* v. *Labor Board*, 305 U. S. 197, 229. 'It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.' *Labor Board* v. *Columbian Enameling & Stamping Co.*, 306 U. S. 292, 300. This is something less than the weight of the evidence, and the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence. *Labor Board* v. *Nevada Consolidated Copper Corp.*, 316 U. S. 105, 106; *Keele Hair & Scalp Specialist, Inc.* v. *FTC*, 275 F. 2d 18, 21."

In this proceeding, the Commission's decision is not arbitrary, capricious, unlawful or discriminatory but, rather, is based upon substantial evidence. The District Court, in properly exercising its judicial review role has correctly affirmed the Commission's action. Appellant's Jurisdictional Statement completely fails to present a single substantial question which requires further argument.

WHEREFORE, Appellees herein submit that the decision of the three-judge Federal District Court from which the appeal by Appellant has been taken should be affirmed in all things without plenary consideration.

Respectfully submitted,

DAVID AXELROD,
Attorney for Appellees Little Audrey's Transportation Co., Inc., and Yellow Freight System, Inc. (Successor to Watson-Wilson Transportation Co., Inc.)

Of Counsel:
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Office-Supreme Court, U.S.
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JOHN F. DAVIS, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1969

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No. 451

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TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOOD EXPRESS, INC. and YELLOW FREIGHT SYSTEM, INC. (Successor to Watson-Wilson Transportation Co., Inc.),

Appellees.

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On Appeal From the United States District Court for the Central District of California

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MOTION TO AFFIRM

o——o——o

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CASE CITED

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STATUTE CITED

Sec. 10, Administrative Procedure Act, 60 Stat. 1709, Subsection (e) 4

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 451

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOOD EXPRESS, INC. and YELLOW FREIGHT SYSTEM, INC. (Successor to Watson-Wilson Transportation Co., Inc.),

Appellees

On Appeal From the United States District Court for the Central District of California

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the appellees, Midwest Coast Transport, Inc., Ringsby Truck Lines, Inc., Refrigerated Foods, Inc. and Curtis, Inc. move that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of the Three Judge District Court (J.S., Exhibit A), not yet reported, dismissing an action brought to set aside an Order of the Interstate Commerce Commission (J.S., Exhibit C). That Order denied a motor contract carrier permit, pursuant to Section 209 of the Interstate Commerce Act, 49 U.S.C. 309, to the appellant, Transportation Unlimited of California, Inc. (Transportation Unlimited), to transport meat, meat products, and meat byproducts, and articles distributed by packinghouses, from points in Iowa; York, Dakota City, Omaha, Fremont, and Scottsbluff, Nebraska; Huron, Sioux Falls, Watertown, Madison and Mitchell, South Dakota; Wichita, Hutchinson and Kansas City, Kansas; Chicago and Momence, Illinois; St. Paul, Minneapolis, Austin, Albert Lea and Worthington, Minnesota; and Madison, Milwaukee and Eau Claire, Wisconsin, to points in California, under continuing contracts with Hoffman Bros. Packing Company, Inc. (Hoffman) and Wilsey-Bennett Company (Wilsey), respectively.

The facts of this case are uncomplicated. In December of 1966, Transportation Unlimited applied to the Commission for the above described permit and included additionally a contract with California Marketing Cooperative. Hearing was held for two days in June of 1967 in Los Angeles, California, and for one day in July 1967, in Washington, D.C. At the hearing the application was restrictively amended so as to delete the request for authority to transport traffic under contract with California Marketing Cooperative, Inc. By Report and Order served in December of 1967, the Examiner recommended that the application be denied in its entirety (J.S., Exhibit B). Exceptions and Replies thereto were filed by the involved parties. By Decision and Order served in April of 1968 by Review Board No. 3, the Interstate Commerce Commission,

with the exception of one modification, adopted the Examiner's Report and affirmed the denial of the entire application (J.S., Exhibit C, Pg. 34). A Petition for Reconsideration requesting that the application be amended to exclude service to Wilsey-Bennett Company was seasonably filed by appellant and replied to by the protestants. By Decision and Order served in August of 1968, the Commission denied the appellant's Petition for Reconsideration (J.S., Exhibit D, Pg. 37). Next, the appellant's Petition for Waiver of the Commission's rule banning repetitive Petitions for Reconsideration, etc., by Order served in October of 1968 by the Interstate Commerce Commission, Division 1, acting as an Appellate Division, was denied. In November of 1968, the full Commission denied appellant's Petition seeking a determination that an issue of general transportation importance was involved. In December of 1968, appellant filed a Complaint in the District Court below, seeking to suspend, enjoin, annul and set aside the Decisions and Orders of the Interstate Commerce Commission. On May 12, 1969, the Three Judge District Court, as previously indicated, dismissed the appellant's appeal (J.S., Exhibit A). From that decision, appellant takes this appeal.

STATUTES INVOLVED

The statutes involved include the National Transportation Policy, Interstate Commerce Act, preceding Section 1, 49 U.S.C., preceding Section 1, Sections 203(a)(15) and 209 of the Interstate Commerce Act, 49 U.S.C. Sections 303(a)(15), 309, and Section 10 of the Administrative Procedure Act, 5 U.S.C., Section 706.

These statutes, with the exception of Section 10 of the Administrative Procedure Act, are set forth on Pages 3 and 4 of the Jurisdictional Statement and on Page 40 of the Exhibits in appellant's Jurisdictional Statement. A full restatement herein would be superfluous.

Section 10 of the Administrative Procedure Act, as pertinent here (49 U.S.C. 17(9), Subsection (e)), sets forth permissible judicial scope of review:

> "So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (a) compel agency action unlawfully withheld or unreasonably delayed; and (b) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of Sections 7 and 8 or otherwise reviewed on the record of an agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error."

QUESTION PRESENTED

Whether it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument?

ARGUMENT

Section 10 of the Administrative Procedure Act limits the question of the ultimate decision herein to whether the Commission's decision that the grant of appellant's application would not be consistent with the public interest and the National Transportation Policy was rational, based on adequate

findings supported by substantial evidence of record, and in accordance with the applicable law. A cursory reading of the Commission's Reports and Orders in the light of the applicable statutory provisions of Section 203(a)(15) and Section 209 of the Interstate Commerce Act, make it evidently clear that the Commission's decision and the decision of the court below should be affirmed.

The Court below and the Commission determined that the plaintiff's action was a proposal to act as a contract carrier as defined in Section 203(a)(15)(a). This finding is not and has never been at issue. Next, the Commission, in compliance with the clear edict of Section 209(b) of the Interstate Commerce Act, proceeded to determine whether the proposed operation would be consistent with the public interest and the National Transportation Policy and as required by Section 209(b) of the Interstate Commerce Act, in reaching that determination, clearly gave consideration "to the number of shippers to be served, the nature of the services proposed, the effect which granting the permit would have upon the services of protesting carriers, the effect of a denial upon the applicant and the supporting shippers, and the changing character of shipper's requirements" (J.S., Exhibit B, particularly Pg. 30-32 and Exhibit C, Pg. 34, 35). To support the Commission's decision that to grant appellant's application would not be consistent with the public interest and the National Transportation Policy, Section 209(b) of the Interstate Commerce Act *does not* require any specific findings or a combination of findings in regard to the five listed factors of consideration. *The law only requires evidence that the Commission considered these factors in reaching its decision on the ultimate issue of consistency with public interest and the National Transportation Policy and that its decision be supported by substantial evidence.* The questions presented in the appellant's Jurisdictional Statement do not question the support of substantial evidence, but, rather: (1)

asserts that a proposal constituting contract carriage under Section 203(a)(15)(a), through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, is entitled to demonstrate *a lesser quantum of proof* in applying the Section 209(b) factors than another applicant proposing contract carrier services as defined under Section 203(a)(15)(b), services designed to meet the distinct need of each customer; and (2) implies that the Commission's decision-making process, rather than involving a balancing of the factors set forth in 49 U.S.C., 309(b) imposed upon the appellant the burden of proof to establish the inadequacy of the existing services and deemed its failure to do so as a binding disposition of the issues. These questions presented by the appellant's Jurisdictional Statement and arguments of their substantiality are found on Pages 5, 6 and 11-19 thereof. A reading of this Court's decision in *Interstate Commerce Commission v. J-T Transport Company, Inc.*, 368 U.S. 81, 14 F.C.C. 81; 409, a definitive decision on the issues herein involved, and the pertinent Commission Reports and Orders herein will make absolutely clear the misleading interpretations and assumptions contained in appellant's statement of Questions Presented and arguments of their substantiality. Specifically addressing ourselves to these questions presented on Pages 5 and 6 of the appellant's Jurisdictional Statement, we offer the following discussion and authorities to establish that the questions presented by appellant are so unsubstantial as not to need further argument.

Question A. Appellant, throughout its Jurisdictional Statement, attempts to free itself from the holding and the principles set forth by this Court in the *J-T Transport Company* case, supra. In short, the appellant asserts that since the contract carriage involved in the *J-T Transport Company* case, supra, fell within the definition of 49 U.S.C., 303(a)(15)(b), that is, transportation service designed to meet the distinct

need of each individual customer rather than contract carriage as herein proposed under 49 U.S.C., 303(a)(15)(a), transportation service through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served, the holding and principles of the *J-I* case are not controlling of the issues herein. Under the clear and simple meaning of the statutes here involved and the language utilized by this Court in the *J-I Transport Company* case, supra, these factual distinctions emphasized by appellant are not cause for different holdings or applicable principles. It is clear from the Court's decision that the two definitions contained in Section 203(a)(15) of the Act for the purpose of making a determination whether the transportation service proposed is in the nature of contract carrier service both refer to services proposed to meet the distinct needs of individual customers. A proposal that assigns vehicles for a continuing period of time to the exclusive use is automatically, under the statute, the proposal of a distinct service. The distinct character of other service proposals to qualify as contract carrier application must be determined by the Commission. But once a proposed service falls within either of those definitions it is a proposal of distinct service, a contract carrier service. This is clearly implied in the *J-I Transport Company* decision, supra, where the Court says:

> "For it is 'the distinct need of each individual customer' that the contract carrier is designed to fill. Section 203(a)(15). *Interstate Commerce Commission vs. J-I Transport Company, Inc.*, 368 U.S. 81, 92."

It is implicit in this language and in the balance of the opinion in the *J-I Transport Company* case, supra, that criteria of Section 209(b) of the Act is equally applicable to the proposed contract carrier service whether it be a proposal falling within the definition under 49 U.S.C., 303(a)(15)(a) or within the definition under 49 U.S.C., 303(a)(15)(b). Once the nature of

the service proposed is determined to be contract carrier service, then the Commission is bound to take into consideration all of the factors mentioned in 49 U.S.C., 309(b) in reaching its determination whether or not the proposed operation would be consistent with the public interest and the National Transportation Policy. No distinction in treatment based on the type of contract carrier service proposed is contemplated by Section 209 of the Act. Both types of contract carrier service are deemed to be designed to fill the "distinct need of each individual shipper." After a proposed service is determined to be that of a contract carrier, in the words of the J-T Court, "... the 'distinct need' of shippers for the new contract carrier service must be weighed against the adequacy of the existing services." *Interstate Commerce Commission v. J-T Transport Company, Inc.*, 368 U.S. 81, 88. Consistency with the public interest and the National Transportation Policy is derived from this determination.

Question B. There is absolutely no basis for concluding that the Commission decision herein compelled appellant to meet all five factors of Section 209(b) as to each of the two shippers originally appearing in support of the application. First, there is no statement to that effect in any of the Commission Reports, and secondly, there is no indication whatever that the Examiner did not give equal consideration to each of the shippers. In fact, the Examiner devoted a full page to a discussion of each shipper's testimony and his findings clearly take note of the individual needs and desires of both shippers (J.S., Exhibit B, Pg. 7-13, and 31). After discussing these needs, the Examiner stated:

> "*Neither* shipper has shown any particular familiarity with the service afforded by existing carriers and *Hoffman* appears to have made virtually no effort to utilize those services (J.S., Exhibit B, Pg. 31)."

It appears that not only did the Examiner discuss both shippers individually but also that he singled out Hoffman specifically in regard to the use of protestants.

Question C The amendment by the appellant to exclude the services of one shipper, thereby reducing the number of shippers to be served, did not significantly change the circumstances that were before the Examiner and the Review Board for decision. As indicated under Question B, there is no evidence whatsoever that the Examiner and the Review Board did not give separate consideration to each of the shipper contracts before it. The fact that the reduction to one shipper contract would make the strongest showing under that specific criterion does not in any way dictate, as implied by appellant, that the proposed operation should then automatically be determined to be consistent with the public interest and the National Transportation Policy. When it is shown by the evidence, as herein, that the distinct service proposed is not needed by the shipper but rather that its needs can be met equally well, if not better, by the protestant common carriers which have a critical economic need for its traffic, then there is substantial evidence to support the finding that the proposed Contract Carrier Permit is inconsistent with the public interest and the National Transportation Policy.

Question D The answer is the same as given under Question A.

Question E The Commission did not compel appellant to initially establish inadequacy of the existing services. Evidence of the adequacy of the existing services to meet shipper's need was submitted by the protestants. The Examiner's Report devotes several pages to a summary of the protestant's testimony in this regard (U.S. Exhibit B, Pgs. 13-30). In referring to the shipper's failure to establish that the protestants are unable or unwilling to provide services needed by shipper,

the Examiner did no more than impose the burden upon the applicant that is specifically assigned to it by this Court in the *J-T* case, supra:

> "The proper procedure, we conclude, is for the applicant first to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need. The protestants then may present evidence to show they have the ability as well as the willingness to meet that specialized need. *If that is done, then the burden shifts to the applicant to demonstrate that it is better equipped to meet the distinct needs of the shipper than the protestants.*" (I.C.C. v. J-T Transport Co., Inc., 368 U.S. 81, at Pg. 90) (Emphasis supplied)

The Commission did not indulge in a presumption. No mention of presumption is made as was specifically done by the Examiner in the *J-T* case, supra. Unmistakably, the "adequacy of existing service" is an element to be considered by the Commission in arriving at its determination of consistency with the public interest and the National Transportation Policy. *I.C.C. v. J-T Transport Company*, 368 U.S. 81, at Pg. 87, 88. The statement by the Examiner at the conclusion of his Report:

> "Protestants are authorized to provide service to most points sought by the application and some of them are transporting a portion of the involved traffic for Bennett (U.S., Exhibit B, Pg. 31)."

is obviously not a statement derived from a presumption, but from evidence presented by the protestants. It is, as the Examiner concludes, "*the record* that fails to show that the shippers have any distinct needs which can be better met by the applicant than by the protestants (U.S., Exhibit B, Pg. 31)." (Emphasis supplied)

Question 1. Review Board No. 3, in its Decision and Order, did not make any implied finding, but rather did make a

concrete and express finding that "a denial of the application will have no apparent adverse effect upon shippers in view of the available and apparently adequate service of the protestants herein" (U.S. Exhibit C, Pg. 35). When Review Board No. 3 made the aforedescribed finding, that finding became a part of the Decision and Order before this Court for review and it can therefore no longer be referred to as a non-existing finding in this matter. There is no basis to conclude that this finding did not give equal and separate consideration to each of the shippers. This implication is answered under Question B.

Question C: Clearly, the Commission gave consideration to the factor of "the changing character of the shipper's requirements." The Examiner's Report makes a specific finding in this regard:

> "And lastly, there is no evidence regarding any *significant* change in the character of either shipper's requirements that protestants would be unable or unwilling to meet" (U.S. Exhibit B, Pg. 32)." (Emphasis supplied)

The summary of testimony contained in the Examiner's Report makes it clear that if Hoffman's needs were changing they were moving in the direction of the shipper, Wilsey Bennett, whose needs were then being met satisfactorily by the existing common carrier service. This change, as noted in the Examiner's Report, is from a movement of all traffic directly to the Los Angeles plant for processing and later distribution to customers to direct shipment to customers in Los Angeles, San Francisco, etc., and its warehouse in San Francisco involving probably split deliveries (U.S. Exhibit B, Pg. 11, 12). In the same report the Examiner also noted that the shipper Wilsey Bennett's present mode of operation involves *split delivery* service from the midwest direct to customers in the Los Angeles and San Francisco areas (U.S. Exhibit B, Pg. 30) and that shipper

Wilsey-Bennett has been using common carriers for all of its traffic without a single substantiated complaint (U.S., Exhibit B, Pgs. 7-10). Thus, the Examiner concluded that there is no evidence regarding any significant change in the character of either shipper's requirements, etc.

Question H. The Decision and Order of the Commission adopted by the Three Judge Court below did not deny the appellant's substantive due process in violation of the Fifth Amendment of the Constitution. As previously indicated, there is no evidence whatsoever that the Commission's Decision and Order discriminated against the appellant in any manner whatsoever. As found by the Court below, "the decision of the Commission that granting the application would not be consistent with the public interest and national transportation was based upon adequate findings based upon substantial evidence in accordance with applicable law" (U.S., Exhibit A, Pg. 2).

CONCLUSION

It is manifest that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument and that the judgment of the Court below should be affirmed.

Respectfully submitted,

FRANCIS W. McINERNY
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September, 1969

AFFIDAVIT OF SERVICE OF MOTION TO AFFIRM

STATE OF NEBRASKA)
) ss.
COUNTY OF DOUGLAS)

KENNETH P. WEINER, being first duly sworn on oath, says:

I am a citizen of the United States, residing in the City of Omaha, County of Douglas, State of Nebraska, my business address is 630 City National Bank Building, Omaha, Nebraska 68102, on the 8th day of September, 1969, I served a copy of the within Motion to Affirm on the parties in this action by placing a true copy thereof in envelopes addressed to each of the following, in accordance with Rule 33 of the Supreme Court Rules:

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and by then sealing said envelopes and depositing the same, with postage affixed, in the United States Mail at Omaha, Nebraska; that there is regular communication between the place of mailing and the places so addressed.

Kenneth P. Weiner

SUBSCRIBED in my presence and sworn to before me, this 8th day of September, 1969.

Notary Public

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No. 451

In the Supreme Court of the United States

OCTOBER TERM, 1969

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC.,
APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

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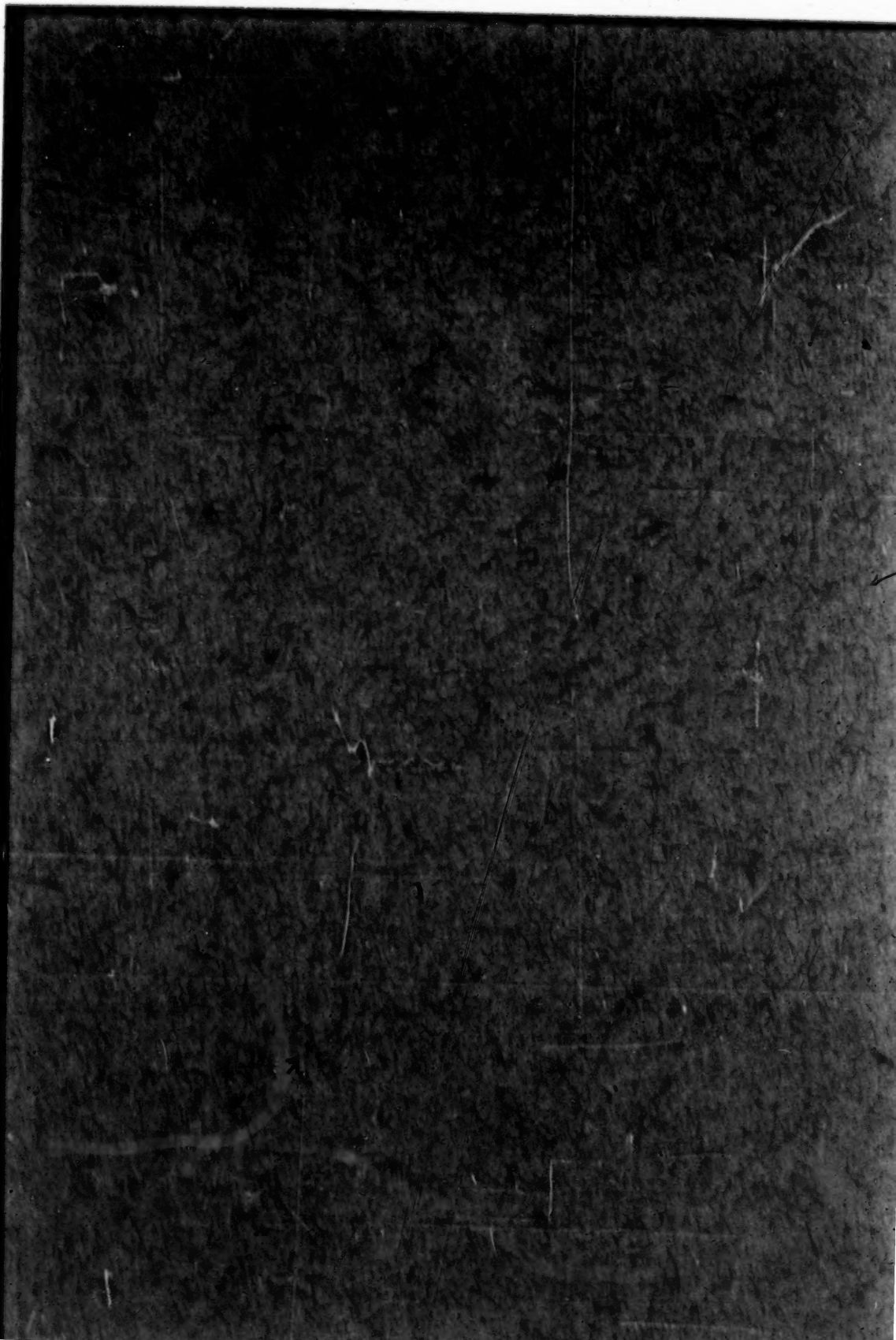

In the Supreme Court of the United States

OCTOBER TERM, 1969

TRANSCONTINENTAL S.S. LINES OF CALIFORNIA, INC.,
APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(e) of the Rules of the Court, the United States of America and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three judge district court (28 U.S.C. § 1253) dismissing an action brought to set aside an order of the Interstate Commerce Commission (28 U.S.C. § 1336). The order denied appellant's application for a motor contract carrier permit, pursuant to Section 209(b) of the Interstate Commerce Act, 49 U.S.C. 309(b).

Organized in October 1960, appellant applied in December 1961 for authority to serve three shippers

as a contract carrier and was granted temporary authority in May 1961 (J.S. Ex. B, 1-3). By the time of the hearing on permanent authority, appellant was seeking to serve only two shippers, and by the Commission's final decision there was only a single shipper, Hoffman Brothers Packing Company, Inc., whose president is the father of appellant's president (J.S. Ex. A, 1; Ex. B, 3).

Several carriers protested the application (J.S. Ex. B, 1-3).

The hearing examiner found that neither of the two shippers under consideration at the time of the report had distinct needs which could be better met by appellant than by the protesting carriers. He noted that neither supporting shipper was familiar with the services available from existing carriers, and that Hoffman had made virtually no effort to use those services. Notwithstanding Hoffman's announced intention to go into private carriage if the application were denied (J.S. Ex. B, 13), the examiner found that protesting carriers would be adversely affected by a grant of authority, through a loss of revenue from the other shipper. He found that the applicant would not be adversely affected, except for loss of the limited amount of traffic it carried pursuant to the temporary authority. The examiner, therefore, recommended denial of the application as inconsistent with the public interest and the National transportation policy (J.S. Ex. B, 30-32).

The Commission's Review Board No. 3 adopted the examiner's report, modified to include a finding of no adverse effect on supporting shippers, and denied the application (J.S. Ex. C, 3). The Commission held that

interest. See *Interstate Commerce Commission* v. *J–T Transport Co.*, 368 U.S. 81, 88–89.

Appellant contends that since its proposed service would qualify as a contract service under subdivision (a) rather than subdivision (b) of the definition for contract service provided in Section 203(a)(15), 49 U.S.C. § 303(a)(15),[1] it should not have the burden of showing that its proposed service is designed to meet a distinct need of its supporting shipper (J.S. 16–17). In *J–T Transport Co., supra*, however, this Court held that the burden was on an applicant "to demonstrate that the undertaking it proposes is specialized and tailored to a shipper's distinct need," see 368 U.S. at 90. Since the need of the shipping public for the proposed service is comprehended within the five factors which apply to all applications for contract service, *id.* at 88–89, there is no reason why the burden should vary according to the type of contract service contemplated. To adopt appellant's proposed distinction would be to destroy the balance among the interests of would-be contract carriers, shippers, and protesting carriers which Section 209(b) establishes. *Ibid.*

---

[1] "The term 'contract carrier by motor vehicle' means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (*a*) *for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of* [redacted] *person served* or (*b*) *for the furnishing of transportation services designed to meet the distinct need of each individual customer* [emphasis added]."

Appellant further contends that the Commission should have given more weight to the father's asserted intention to use private carriage if his son's application was ultimately denied (J.S. 17–18) and to the fact that appellant proposes to serve only a single shipper (J.S. 14). But there is "no room for a presumption in favor of, or against, any of the five factors on which findings must be made under § 209(b)." *J-T Transport Co., supra,* 368 U.S. at 89. The weighing of those factors was for the Commission, and the court below properly refused to substitute its judgment for the judgment of the Commission.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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SEPTEMBER 1969.

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IN THE

Supreme Court of the United States

October Term, 1969
No. 451

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOODS EXPRESS, INC., and YELLOW FREIGHT SYSTEM, INC. (Successor to Watson-Wilson Transportation Co., Inc.),

Appellees.

On Appeal From the United States District Court for the Central District of California.

BRIEF OPPOSING MOTION TO AFFIRM.

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IN THE

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October Term, 1969
No. 451

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC., a Corporation,

Appellant,

vs.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION; MIDWEST COAST TRANSPORT, INC., RINGSBY TRUCK LINES, INC., REFRIGERATED FOODS, INC., CURTIS, INC., LITTLE AUDREY'S TRANSPORTATION CO., INC., FROZEN FOODS EXPRESS, INC., and YELLOW FREIGHT SYSTEM, INC. (Successor to Watson-Wilson Transportation Co., Inc.),

Appellees.

On Appeal From the United States District Court for the Central District of California.

BRIEF OPPOSING MOTION TO AFFIRM.

This Brief is filed in opposition to appellees' Motion to Affirm pursuant to Rule 16, Paragraph 4 of the Rules of the Supreme Court of the United States.

Appellees uniformly misinterpret, misconstrue or misunderstand appellant's basic contentions by asserting an attempt by appellant to excuse itself from application of the principles and holdings of the Court in *Interstate Commerce Commission v. J-T Transport Com-*

pany, Inc., 368 U.S. 81, 14 F.C.C. 81,409. *(M.A.-L.A., pp. 2 and 7; M.A.-Midwest, pp. 6-7; M.A.-S.G. & I.C.C., p. 4). The thrust of appellant's contention is *not* that the five criteria of Section 309(b) (49 U.S.C. 309(b)) are *inapplicable* but that the quantum of proof under the said five criteria varies depending upon the type of contract carriage as defined in Section 303(a) 15(a) or 303(a) 15(b).

Appellees circumvent appellant's contention that the 309(b) criteria, admittedly applicable to contract carrier applications under 303(a) 15(a), were applied by the Commission and the lower Court under a *dual* supporting shipper circumstance and not under a *single* shipper support situation. The effect of such application of the law was to deny appellant substantive due process of law under the Fifth Amendment to the United States Constitution. Declaration by appellees that the "inadvertent error in the (lower) Court's factual recitation is of no moment" is completely refuted by the said lower Court's adoption of the findings of fact by the Commission (M.A.-L.A., p. 4). (emphasis added).

None of the appellees squarely meet the vital issue of the failure of the Commission to apply the first criteria of 309(b), i.e., the number of shippers to be served, save as to meeting the definition of the con-

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*M.A.-L.A. refers to Motion to Affirm of Appellees Little Audrey's Transportation Co., Inc. and Yellow Freight System, Inc. (successor to Watson-Wilson Transportation Co., Inc.);

M.A.-Midwest refers to Motion to Affirm of Appellees Midwest Coast Transport, Inc., Ringsby Truck Lines, Inc., Refrigerated Foods, Inc., and Curtis, Inc.;

M.A.-S.G. and I.C.C. refers to Motion to Affirm of Appellees Solicitor General and Interstate Commerce Commission.

tract carriage requirement of Section 303(a) 15(a). Appellees argue that appellant contends a single shipper service would automatically meet the essential requirement of consistency with the public interest and the National Transportation Policy (M.A.-L.A., p. 4; M.A.-Midwest, p. 9). Such assertions are proffered to beguile and mislead the true import of appellant's contention that upon the application of the first criteria to the ultimate fact of a single supporting shipper—in such case "it would be impossible to make any stronger showing *under the test involved*" *Meat Packers Express, Inc.-Extension-Dennison,* 100 M.C.C. 401 (on remand), 1966 F.C.C. 35,978 (emphasis added). Thus, as the *J-T* case holds "there is no room for a presumption in favor or against any of the five factors", so should there be no failure to weigh or balance any one of the five factors in determining consistency with the public interest and the National Transportation Policy as required by Section 309(b).

Again, appellees attempt to minimize the argument that the Commission and the lower Court, in espousing the Hearing Examiner's finding that the *shippers* failed to establish that the appellee carriers are unable or unwilling to provide services needed by the shippers (J.S. Exhibit B, p. 31), do no less than impose the burden upon appellant to establish inadequacy of existing services, manifestly contrary to this court's holding in the *J-T* case, *supra* (M.A.-L.A. pp. 5-6; M.A.-Midwest, pp. 9-10). It is interesting to note at this juncture that appellees have, by editorial license, limited the Examiner's finding to the *singular* shipper instead of the *plural* shippers. The effect of such finding can hardly be other than, as appellant contends, a misapplication

of the second criteria of Section 309(b), namely: the nature of the service proposed.

Appellees' motions are singularly devoid of any response to appellant's argument that the Commission and the lower Court, with respect to the third criteria (the effect which granting the permit would have upon the services of protesting carriers), patently misapplied said criteria and the *J-T* case holdings, in failing to recognize the import of the fact that: (1) appellees are not now transporting the traffic involved, hence no diversion from the supporting shipper; (2) the supporting shipper would not use appellees' services if the permit were denied; and (3) this is not the "unusual case" as to cause adversity to appellee protesting carriers (*J-T* case, *supra,* 368 U.S. at 93). Yet, the Commission and the lower Court found a grant of the application *could* adversely effect the operations of existing carriers inasmuch as a *portion* of the traffic (only of Bennett) would be subject to diversion (J.S. Exhibit B, pp. 21-2) (emphasis added). At any rate, any adverse effect which a grant of authority might have upon the appellees' services would be outweighed by the advantages to the supporting shipper of having appellant's service available. *Meat Packers Express Case, supra.* Again, the Commission and the Court's application of the said criteria was accomplished in the light of multiple shippers and not a single shipper, and as such, cannot be waved away as "an equal and separate consideration to each of the shippers" as appellees would

like the Court to believe (M.A.-L.A. p. 4; M.A.-Midwest, pp. 8, 9 and 11).

Assuming, arguendo, that denial of application would have no apparent adverse effect upon appellant, the fourth criteria—effect of denial upon appellant and/or its shipper, such a denial would deprive the shipper of a service particularly well suited to meet its transportation needs. In *Earl Dibble Contract Carrier Application*, 92 M.C.C. 610 at 616, the Commission stated:

> ". . . hence a denial of the application would . . . impel it (shipper) to continue the utilization of its proprietary operations, a service . . . it desires to curtail. Furthermore, proprietary trucking is a form of carriage which, regardless of the circumstances, contract carriage ought to be free completely and satisfactorily to replace" (emphasis added).

To argue blithely that the Commission's use of the word "shippers" in place of the singular form was of no consequence or significance, or that there is no basis to conclude that the finding that a denial would have no apparent adverse effect upon the shippers "gave equal and separate consideration to each of the shippers", without argument or support thereof, is to beg the basic issue and contention of appellant that the very consideration of the five criteria under Section 309(b) was performed in the light of a plurality of shippers, rather than a single supporting shipper. Such misapplication culminated in a requirement that all five criteria must be met for *each* shipper prior to the grant of authority, rather than as provided by Section 309(b)

that . . . "a permit shall be issued to any qualified applicant therefore, authorizing in *whole or in part* the operations covered by the application . . ." (Section 309(b), J.S., Exhibit B, p. 41).

A reading of the Commission's finding, without supporting evidence, that there is "no evidence regarding any *significant* change in the character of either shipper's requirement that the *protestants would be unable or unwilling to meet*" (J.S., Exhibit B, p. 32) (emphasis added) evidence, *per se*, a finding that there is some change in the character of either shipper's requirements. In addition, the requirement that appellant demonstrate that appellees would be "unable or unwilling to meet" once again evidences the placement of an impermissible burden upon appellant to establish that the existing services are inadequate, and that appellant demonstrate a unique, different or distinctive type of *service* which cannot or will not be performed by appellees (J.S. Exhibit p. 31).

Thus, it is obvious that although the five criteria of 309(b) were recognized and enunciated by the Commission in its Decision and Order adopted by the Three-Judge Court below, such recognition and announcement did not automatically guarantee *proper* consideration by the Commission and Court, particularly when the scales upon which the said five criteria were to be weighed were "improperly balanced," thus culminating in a misapplication of the criteria under an incorrect assumption of the existence of facts to which the said criteria

were applied. As a consequence, such improper or misapplication of the law was a denial to appellant of substantive due process in the violation of the Fifth Amendment of the Constitution.

It is submitted that the Court should not allow such arguments as propounded by appellees to persuade it to dispose of this appeal without plenary consideration, and, accordingly, probable jurisdiction of the appeal should be noted.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

October Term, 1969

TRANSPORTATION UNLIMITED OF CALIFORNIA, INC. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 451. Decided November 10, 1969

PER CURIAM.

The motions to affirm are granted and the judgment is affirmed.